Supreme Court, U.S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

80-1181

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and THE ESTATE OF OLAF H. NELSON,

Petitioners,

v.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

SMALL TRACT APPLICANTS ASSOCIATION,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. CA 77-3429

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QUESTIONS PRESENTED

1. Whether petitioners were required to prove valuable mineral deposits by showing a general market for the minerals on their claims, or required to show specific sales of minerals from each of their claims.

2. Whether agency policy decisions exceeded discretionary statutory powers when applying the "too much", or excess reserves rule, which amounts to legislative enactment by executive tribunals which lack such authority under our system of separation of powers.

3. Whether summary judgment should be sanctioned for judicial review of administrative proceedings concerning validity of mining claims, where isolated portions of evidence supporting agency position are considered and evidence supporting the mining claimants' position is disregarded when the proper standard is the "evidence considered as a whole rule", as interpreted by this honorable Court and as promulgated under the Administrative Procedure Act.

4. Whether public resentment of excessive bureaucracy and its cost and the resentment of bureaucracy's claiming to own some 86% of the land in Nevada presents a constitutional crisis of sufficient importance to call for issuance of the writ to review on the merits petitioners' patent application Nevada 012928.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following members of the agency were named below:

John F. Boyles, District Manager, Bureau of Land Management; William J. Malencik, Chief, Division of Technical Services, Bureau of Land Management; E. I. Rowland, State Director, Bureau of Land Management; Burton W. Silcock, Director, Bureau of Land Management; Rogers B. Morton, Secretary of the Interior, Department of the Interior.

In our view, it is sufficient to substitute and name only the present Secretary of the Interior, Cecil Andrus.

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OPINIONS BELOW
(Reproduced in the Appendix hereto)

The administrative decision of the United States Department of the Interior concerning Petitioners' application for mineral patent Nevada 012928 is found in: the unreported decision of the Hearing Examiner, August 15, 1968, in Contests Nevada 3092-3095, 3097-3106, 3108-3113 and 3224, set out A-31, and the decision of the Interior Board of Land Appeals, March 22, 1971, published in 2 IBLA 64 and in 78 I.D. 71. Set out A-53.

The decision of the United States District Court for Nevada, June 15, 1976, affirming the administrative decision, is unpublished. Set out A-6.

The unpublished decision of the United States Court of Appeals for the Ninth Circuit, affirming the District Court, June 15, 1976, is set out A-1.

The unpublished order of the Ninth Circuit denying plaintiffs' petition for rehearing, entered October 18, 1980, is set out A-30.

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from October 17, 1980, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

STATUTES INVOLVED

(In pertinent part only)

30 U.S.C. Sec. 22. Lands open to purchase by citizens.

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States..."

30 U.S.C. Sec. 35 Placer claims

> "Claims usually called "placers", including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; . . ."

30 U.S.C. Sec. 611 Common varieties

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: . . .
> (July 23, 1955)

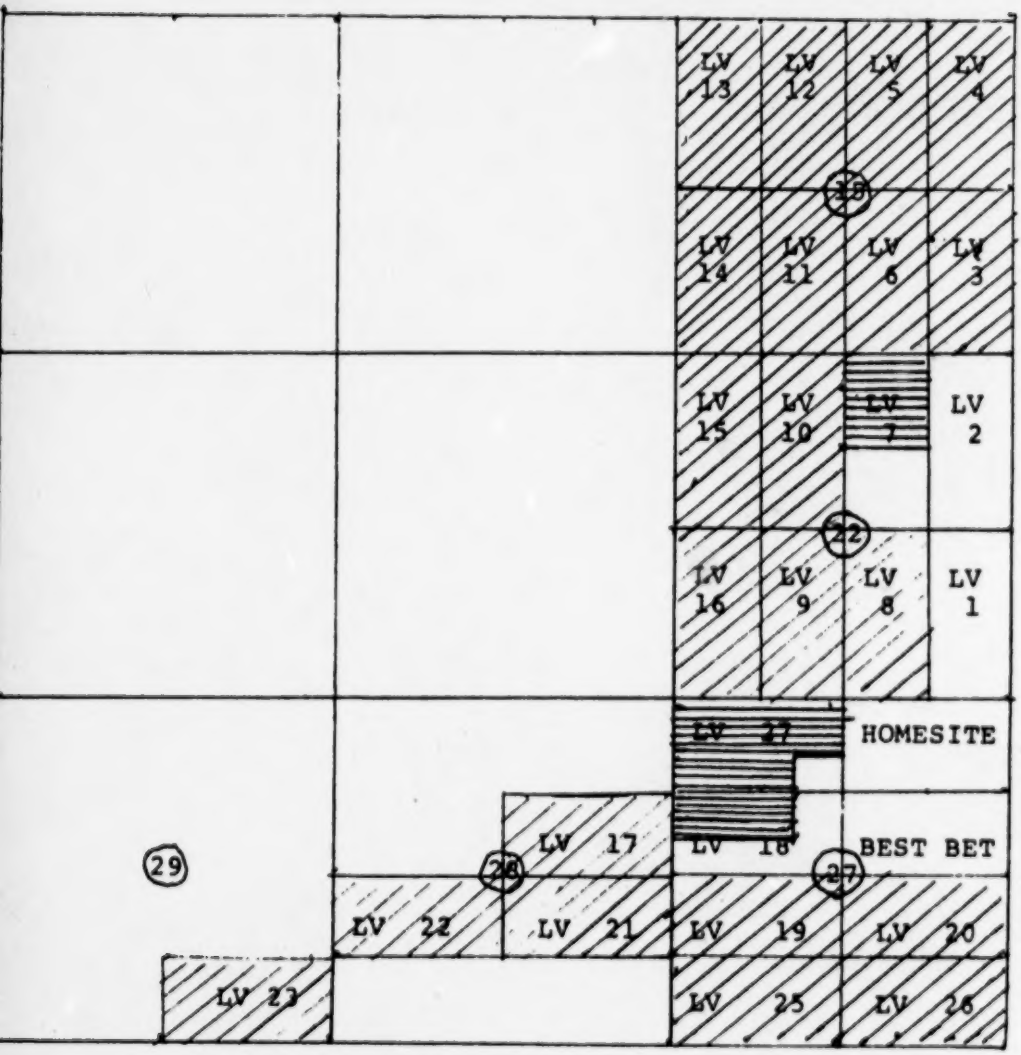
STATEMENT OF THE CASE

Facts material to consideration of the questions presented are as follows:

This case involves twenty-one placer mining claims, eighty acres each, five miles from the center of the City of Las Vegas, Nevada, located on ground open to mineral entry for sand and gravel on March 20, 1948, by V. D. Bradley et al. The claims were conveyed on June 1, 1948, to O. H. Nelson, whose estate is one of the petitioners. September 24, 1952, O. H. Nelson conveyed a one-half interest in the claims to William A. McCall, Sr. A-32.

On March 24, 1953, Mr. Nelson and Mr. McCall filed application for patent Nevada 012928 to all of the claims ex-

LAS VEGAS PLACER CLAIMS
Situated in Sections 15, 22, 27, 28 & 29
Township 20 S., R. 60 E., M.D.M. - Nevada



LAS VEGAS PLACER CLAIMS Nos. 3,4,5,6,8,9, 10,11,12,13,14,15,16,17,19,20,21,22,23,24, 26, contested in CA 77-3429

Unpatented fractions of claims 7, 18, 27 at issue in CA 78-1065

Ground patented previously.

cept Las Vegas No. 23.

Some six months later, October 2, 1953, the land was classified for disposal under the Small Tract Act. A-32. October 8, 1954, the Bureau of Land Management issued a final certificate to Nelson and McCall. A-32.

On March 18, 1960, the agency filed contest complaints challenging the discoveries as to Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26.[1/]

March 27, 1959, Las Vegas No. 23 was conveyed to the Dredge Corporation. A contest complaint against Las Vegas No. 23, filed June 21, 1961, alleged lack of market for the mineral materials before July 23, 1955. A-32, 33. The contests involved in the present case, CA 77-3429, were tried together April 21 to 23, 1965.

John R. Rampton, Hearing Examiner,

1/ Claims Nos. 1, 2, 7, 18 and 27, also contested in 1960, have been patented in part and are the subject of the companion case for which writ of certiorari is also sought, McCall et al. v. Andrus et al., CA 78-1065.

concluded August 15, 1968, that:

> "The allegations of the complaints have been sustained and the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims are held to be void." A-52.

Except as to claim No. 23, the charge of want of marketability of the mineral in the contest complaints speaks as of the date of the contests filed in 1960 and tried in 1965. The charge that the mineral lacked a market before July 23, 1955, was made only in the complaint filed against claim No. 23. A-33. Yet the Hearing Examiner based rejection of patent to all the claims on a conclusion "that the market, if it now exists, for the material found on the claims in issue came after the passage of the Act of June 23, 1955." A-52. He rejected 20 of the claims on the basis of a charge not made in the contest complaints. His decision is inconsistent with his finding:

> There is, at present, a market for a portion of the sand and gravel found upon these claims. A profitable operation now exists on the Las Vegas Nos. 12 and 13. However, there is no

> present market for all of the material found upon the claims in issue. These 21 claims encompass 1,680 acres. There are approximately 1-1/2 tons of gravel in a cubic yard; using this figure as a basis, a 1,680-acre excavation, 12 feet deep, would yield 49,000,000 tons of sand and gravel. If the present yield of approximately 400,000 tons a year continues, the claims contain enough reserves for approximately 121 years. Mr. Bradley, operating on the adjacent homesite claim, has gone down to a depth of 35 feet, and, if gravel from the claims in issue was excavated to this depth, the reserves at the present rate of production would last 363 years." A-43.

In the agency decisions, analysis of the evidence distorts testimony supporting marketability of sand and gravel on the contested claims and warps its meaning into support for the agency's position. Statements favorable to the contestees are ignored or misinterpreted.

For example, the Hearing Examiner's decision minimizes erroneously the commercial use of material from the contested claims made in 1948 by Vernon Bradley, who was then the major producer of gravel in the Las Vegas area. The

agency decision states: "Approximately 500 total tons of material were sold from all of the 27 claims which he had located." A-41. But Mr. Bradley testified that in 1948 he sold this fine material, ideal for patching concrete in 500 ton lots. Tr 280. They bladed a road into claims Nos. 3 and 4, in Section 15, Tr 279, 280. They would windrow the fine, sandy material, mix it with oil and haul it from there to the City yards. Tr 300.

Mr. Bradley's crew did discovery work on each of the contested claims, and found sand and gravel on each of them. Tr 278-279. They took a minimum of 50 to 100 yards from each of the 20 claims. Tr 280-281.

Mr. Bradley's testimony establishes that the claims were located not only as reserves but for immediate commercial use in 1948 of the various types of gravel readily accessible in the washes which cross the area. Tr 276, 278.

While Mr. Bradley did not keep watch over Mr. Nelson's operations after he sold out in 1948, he knows that Mr. Nelson obtained materials needed for

the air base from the claims up the big wash that runs through Section 28 (where claims 17 and 21 are located). Tr 297., 298. Mr. Bradley stated that quite a bit of bulldozer work had been done before Mr. Nelson hired him to put down in 1957 the backhoe trenches on ten-acre subdivisions. Tr 302.

Mr. Bradley knew that Mr. Nelson made use of great quantities of material from the Las Vegas claims to fill the huge contracts he performed from 1948 into the early 1950's such as the Charlestone Underpass. Tr 293.

Mr. Bradley's testimony does not justify the statement in the Court of Appeals decision that his testimony supports the government's prima facie case. A-5. While Mr. Bradley did not pay much attention to how much material was removed from the contested claims from the time he sold out in 1948 to 1957, and could not say whether any significant amount was produced from those claims during that time (Tr 305), this does not amount to a statement

that he "did not know of the removal of any significant amounts of material from the contested claims prior to 1955", attributed to him by the court below A-5. His own removal of material in 1948, wrongly stated by the Hearing Examiner to have occurred in 1957, was sufficient to establish that each of the claims contained readily accessible material suitable for commercial use in the then existing market. It was "just enough to prove to ourselves that it was what we were looking for." Tr 291. It would meet specifications. After having tested that the claims contained material valuable for commercial use, it was not necessary to carry on continuous exploitation; they could be held as reserves in an area that "was the closest gravel to town" Tr 318 and was certain to experience increasing market demand as the city continued to grow. Mr. Wells, president of Wells Cargo, Co., which owned the adjoining Best Bet claim, testified that for that reason he wanted to acquire an

interest in the Las Vegas group of claims from 1950 on. Tr 340-341. "Where these big washes and these alluvial fans that come down through these deposits here, makes this one of the most ideal gravel locations on the northwest side of the City." Tr 350 (Wells). "As I said, I know that these particular deposits would meet specifications on any material that we have ever been required to produce in this area." Tr 350.

The Hearing Examiner's misinterpretation of the evidence concerning marketability of the material on the claims A-41 was repeated in the IBLA opinion A-63, which was copied as the findings of the District Court A-14, and it influenced the decision of the Court of Appeals.

All the decisions disregard the testimony of the Government's expert witness, Mr. Scarfe, that loose gravel occurs above the cemented gravel, which he called caliche, throughout the area of the claims A-60 and dwell upon the added expense that breaking up the cemented gravel would

require. Mr. Wells' testimony does not state that the cost of blasting the cemented gravel was prohibitive or precluded exploitation of the contested claims. "It is a little costlier and we certainly don't like to do it unless we have to...If it is necessary to drill it and shoot it, we do." Tr 351. There is nothing in the record to establish that the cemented gravels, which make high specification gravel, could not be mined at a profit even though the cost of blasting might result in a smaller profit as compared to mining the loose gravels, prior to the time when improved equipment made such mining easier.

The Court of Appeals decision overlooks the fact that cemented gravel does not cover the claims like a table cloth covers a table but only outcrops sporadically on the surface and occurs in other places at varying depths from one to four feet below the surface. Tr 144 (Scarfe). The Court of Appeals decision reflects

an over-simplified description of the claims, suggested by the hearing examiner's decision A-40 that the loose gravel on the claims was overlain with a layer of hard cemented gravel and could not have been mined profitably to supply the existing demand for sand and gravel. A-4.

Mr. Scarfe's statement that there had been trenching and bulldozer work on the claims but no mining of the 20 claims in 1959 (Tr 180) disregards the fact that the shallow excavations made in the washes in 1948, testified to by Mr. Bradley, would have been obliterated by the recurring seasonal floods.

None of the decisions mention the evidence favorable to the mining claimants provided by Mr. Scarfe's study of market demand for sand and gravel in the Las Vegas area, which showed a very substantial market in the period prior to 1955 and a rapid increase thereafter. Tr 150-, 153, 167.(Scarfe).

Mr. Scarfe testified that on the basis of Bureau of Mines figures for consumption of sand and gravel, he had estimated the quantity marketed in the Las Vegas area for the years 1950 through 1957, and projected the estimate on for the next 20 years. Tr 160, 166. For the 12 year period from the middle of 1947 through the middle of 1959, he estimated that 15 million tons of gravel had been used in the Las Vegas area, and that for the 20-year period from July 1959 through July 1 1979, 73 million tons would be used. Tr 167. Dividing these figures by the number of years would give an average market in the critical period prior to 1955 of one and a quarter million tons.

Mr. Scarfe also testified for the Government that the material on the contested claims, including the cemented gravels was similar to that which was being mined on the Wells Cargo operation, a short distance to the south, Tr 203, and that even the cemented gravels could be processed into satisfactory specification gravels. Tr 186.

The fact that the classification of the land covered by the mining locations for disposal under the Small Tracts Act, made after location of the mining claims had segregated the land from the unappropriated public domain and had closed the land to other disposition, was illegal, was pointed out at the contest hearing by Mr. Nilsson, attorney for the mining claimants. Tr 112, 411. It was raised in the District Court and was called to the attention of the Court of Appeals in petitioners' briefs.

The decision ignores the evidence from the administrative file shown by intra-agency correspondence quoted in petitioners' Reply Brief, pp. 22-24, which reveals the embarassment caused by the hundreds of Small Tract applications, represented by the Intervenor herein, Small Tract Applicants Association. For example, the agency's eagerness to invalidate the petitioners' mining claims in order to satisfy the Small Tract applicants is shown by the letter from the State Supervisor

of the BLM for Nevada to the Director January 24, 1961:

> "The patent application was filed on March 27, 1953, and since that time, it has been the subject of no less than six independent mineral examinations. In addition to the possibility of having to perform a seventh examination, there is the problem of 495 small tract applications existing on the subject lands. Since many of these cases have been pending since 1953, you can understand our concern over the possibility of prolonging their final adjudication any longer than is necessary.
>
> "To further compound the problem, the mineral applicants have placed a crushing and screening plant on one of the claims and are producing aggregate. There is no legal bar to prevent the removal of the material from the claim, and technically, the operation should have no bearing on the outcome of the hearing, should one ever be scheduled. However, from a practical point of view, the presence of equipment producing sand and gravel products for sale in the Las Vegas market, cannot but help to strengthen the applicant's case and weaken our own.
>
> * * * *
>
> "We would like to proceed against the remaining claims even if it necessitates two separate hearings.

> By so doing, we will be acting on 441 Small Tract cases as well as a major portion of the mineral application.
>
> "Anything you can do to precipitate the rescheduling of this case for hearing will be deeply appreciated."

The decision below assumes on the basis of Mr.Scarfe's testimony that he did not see any evidence of mining on the claims having been done prior to his 1959 examination that in order to establish discovery it was necessary to drill and blast the cemented gravels. A-5. The court below failed to recognize that when patent was applied for, the Foster v. Seaton criteria of bona fides in development, accessibility, proximity to market were satisfied by mining the loose gravel in the dry washes, which was then the customary way of establishing discovery. Tr 292.

The decision below is based upon uncritical acceptance of findings which the District Court had copied from the IBLA decision, which were based on misstatement of testimony given by wit-

nesses for the contestees. For example, the Hearing Examiner's assumption that "At that time (1948 when Mr. Bradley made commercial use of material from the contested claims) there was no present demand for the material found upon the claims because the market was being supplied by existing sand and gravel plants" A-51 was actually contradicted by Mr. Bradley, who stated that the claims were located, not only for future reserves, but also because he had in 1948 an immediate need to make commercial use of the various types of gravel found on the contested claims to meet specifications for contracts, and that he did make actual commercial use of the material brought in from each of the 20 contested claims to test whether the claims contained commercially useful material - "just enough to prove to ourselves that it was what we were looking for." Tr 291.

George Monahan, registered professional engineer, made the following

affidavit, February 14, 1956, part of the patent application file Nevada 012928:

> "I, George Monahan, a duly appointed Resident Engineer for the Department of Highways, State of Nevada, during the years 1948, 1949 and 1950, do hereby certify I have inspected the Placer Claims leased by O. H. Nelson as shown by the map. I also tested samples taken from the claims and found the material to be of high quality which could be processed to meet the State Specification for Type 1 Base Material; Type 2 Surfacing and Plant Mix Aggregate. The processed material met all the requirements for concrete aggregate when washed and blended. The Claims with conglomerate and cemented material can be made to conform to specifications by blasting or the use of a ripper to break and loosen the material.
>
> "I herewith certify that the various aggregates used in the construction of the Main Street Bonanza Project 1948 and the Charleston Boulevard storm sewer project 1949 and 1950 came from the Placer claims shown on the map. These claims have high commercial value due to the high quality and quantity and the close proximity to the Las Vegas Market. Extensive improvements have

> have been made on the Placer Claims over a period of approximately eight years, including roads, wells, reservoirs and exploratory work.
>
> /s/ George Monahan
> GEORGE MONAHAN, Registered Professional Engineer, Nevada State License No. 631."

In 1948, the State of Nevada purchased aggregates for construction of the State Highway project in the City of Las Vegas, for which a contract in the amount of $253,204.86 was awarded to the Olof Nelson Construction Co., as well as the aggregate to construct the Charleston Blvd. underpass and storm sewer project costing $746,227.89. A letter in the patent application file, Nevada 012928, concerning this material furnished from the Las Vegas group of claims by Mr. Nelson states:

> "In regard to conglomerate, calechi and cemented material on the claims, I wish to state that a great deal of the hard pan material was ripped loose and mixed with the loose rock and sand with no detrimental effect to the aggregate used for Type 1 and Type 2 surfacing. The crused material to be processed for specification concrete aggregate containing calechi fines were also ap-

proved after washing and scrubbing at very little extra cost."

The United States District Court for the District of Nevada, Las Vegas Division, was the federal court of first instance in which the petitioners sought judicial review of the administrative rejection of patent, pursuant to the Administrative Procedure Act. Under 28 U.S.C. Section 1331, the district court had jurisdiction to hear the case arising under the mining laws of the United States, brought against an agency of the United States.

The Court of Appeals had jurisdiction to hear the appeal from the decision of the District Court under Title 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why the writ should be granted. Doctor of Jurisprudence Alpheus Thomas Mason, a noted constitutional scholar, Princeton's McCormic Professor of Jurisprudence, Emeritus, warns that we are faced as a nation with our fifth constitutional crisis. This time, the clash

is between the mushrooming federal bureaucracy and a taxpaying electorate that resents its high costs. Princeton Alumni Weekly, January 15, 1979. President-elect Regan supported the movement in the Western States which expresses this resentment against bureaucratic control of Western lands. This movement has been named the Sagebrush Rebellion by the press.

If allowed to stand, the decision below will affect adversely the mining of all minerals, including strategic minerals in short supply. If domestic mining operations are shot down one by one, our national economy and defense will be in jeopardy.

A conflict of opinion exists between the Ninth Circuit and the Tenth Circuit, as recognized in Nickol v. United States, 501 F 2d 1389, 1390 (10th Cir. 1974). The court said, referring to the Ninth Circuit:

> "One court has characterized a judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence as 'only a question of law' and therefore 'subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.).

See also Beane v. Richardson, 457 F2d 758 (9th Cir.); White v. Udall, 404 F2d 334 (9th Cir.); Henrikson v. Udall, 350 F2d 949 (9th Cir.); Todaro v. Pederson, 205 F Supp. 612 (N.D. Ohio 1961), aff'd 305 F2d 377 (6th Cir.); 6 Moore's Federal Practice p. 56.17 (3) at 2472-73 (1974).

"The very purpose however of such judicial review of agency action is to examine the facts in the record. Universal Camera Corp. v. NLRB, 340 U.S. 474 at 484. Thus, it would seem that the prerequisites for a summary judgment under Fed. R. Civ. p. 56 are absent in a review of the administrative record under the circumstances before us." 501 F2d at 1390.

The Supreme Court said in Universal Camera that a reviewing court should set aside an agency decision when it cannot find that the evidence supporting that decision is substantial, when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view. 340 U.S. at 488. The Supreme Court (Mr.Justice Frankfurter) stressed that reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. p. 490.

We have shown in our Statement of Facts material factual evidence opposed to the agency's position, which should have been taken into account to view the record in its entirety. Agency findings based on selected portions of the evidence favorable to the agency's position and disregard of the probative facts which controvert that position do not constitute a proper basis for the decision of the court below.

Petitioners called to the attention of the court below misinterpretation in the administrative decision of testimony favorable to the petitoners' position, particularly the testimony of Mr. Bradley and Mr. Wells, showing that marketing of the sand and gravel present on each of the claims was commercially feasible prior to July 23, 1955.

Petitioners called to the attention of the court below the pressure placed upon the agency by the Small Tract applicants, represented in the case by the intervenor, to invalidate

petitioners' mining claims so that the land could be disposed of under the Small Tract classifications which had been made illegally, after location of the mining claims had segregated the land from the public domain and closed it to other disposal.

The agency decision was vitiated by distortion of the evidence used as basis for finding that the gravel on the claims was not marketable prior to the critical 1955 date. Mr. Bradley's sales in 1948 of fine material from claims 3 and 4 in Section 15 in 500 ton lots was shrunk to total sales of 500 tons of sand and gravel from all 21 contested claims prior to July 23 1955. His commercial use of material removed from each of the claims to test its marketability in 1948 was shifted to a time later than 1955. Mr. Wells' testimony that blasting was done when necessary was twisted into a statement that the cost of blasting precluded exploitation of the cemented gravels (called calechi, which is a rock and not gravel) and precluded mining

of sand and gravel covered by a layer of cemented gravels until after 1955.

Under those circumstances, the court below departed from the usual and accepted standard for considering the evidence in the record as a whole when it declared that the administrative decision was supported by substantial evidence.

The Supreme Court's interest in supervising the administration of justice in administrative tribunals and in the law courts should lead the Court to review the present case.

A general market demand for sand and gravel in the area is sufficient to establish marketability of material which meets the specifications of quality. To satisfy the marketability test petitioners need not show a demand for sand and gravel on each of their specific claims.

In United States v. Lauren W. Gibbs et al. 13 IBLA 382 (1973) the Board said:

> "Another oft-stated misconception, encountered again in this case, is the proposition that

> 'To satisfy the marketability test, a mining claimant must show the existence of a demand for the material on his specific claim, and not simply a general demand for the type of material in question.' We must acknowledge our own contribution to the perpetuation of this fallacy. See e.g. United States v. McCall, 2 IBLA 64, 78 I.D. 71, 80 (1971); United States v. Osborne, 77 I.D. 83 (1970) and cases therein cited. To require this of the claimant is to impose in most instances, an impossible burden upon him." 13 IBLA at 393.

In Gibbs, the Board disapproved of the very decision, United States v. McCall, 2 IBLA 64, 78 I.D. 71,80 here under consideration. A-53.

Gibbs rejected the doctrine of Osborne v. Hammit, 377 F Supp 977 (D.C. Nev. 1964) which requires proof of actual sales in order to satisfy the marketability aspect of the discovery requirement, rejecting anything less than actual production at a profit as credible evidence that gravel present on a mining claim in the Las Vegas area, which is one vast deposit of similar geologic origin and contains thousands of acres of gravel of the same general quality, could have been produced and

marketed at a profit. The District Court for Nevada said in Osborne v. Hammit:

> "If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.
>
> "We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims

> near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton, supra by proving bona fides in development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely." (Quoted in United States v. J. R. Osborne et al., 77 I.D. 84 at90.

Gibbs pointed out that Osborne's requirement of actual successfulexploitation in order to satisfy the prudent-man test of the discovery requirement had been effectively negated by the Ninth Circuit's holding in Barrows v. Hickel, 447 F2d 80 (1971) and in Verrue v. United States, 457 F2d 1202 (1972), that actual, successful exploitation of a mining claim is not required to satisfy the prudent-man test.

The headnote in the IBLA decision in the present case follows the dis-

credited doctrine of Osborne v. Hammit, and states:

> "Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, is insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void." A-53.

The Board said in the present case:

> "The best that can be said for the testimony on behalf of the contestees is that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims, but nothing was adduced to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955. The testimony was insufficient to show a discovery because to satisfy the present marketability test the

> the claimants must show the existence of a demand for the material on the specific claims and not simply a general demand for the type of material in question." (citations omitted.). A-71
>
> "The claimants contend the successful mining operations on similar mineral materials in the adjacent Las Vegas Nos. 1, 2, 7, 18 and 27 claims and in other claims nearby before July 23, 1955, is adequate proof that these claims could also have been operated at a profit in that period. This is the same type of theoretical evidence which the court in Osborne v. Hammit, supra, found to be insufficient to satisfy the marketability test as to similar placer mining claims in the Las Vegas area..... " A-72.

The court below took a contradictory position when it upheld the Board's ruling which rejects a showing that the materials on the contested claims were theoretically capable of being marketed since this requires the proof of having actually exploited the material at a profit, and the court disclaims so doing.

Agency decisions here were policy decisions and exceeded discretionary and statutory powers by applying the "too much," or excessive reserves rule.

This amounts to legislative enactment by executive tribunals which lack such authority under our system of separation of powers. Petitioners' application for patent should not have been rejected on the basis of the "too much" rule contrary to the teaching in Baker v. U.S., 615 F2d 224 (9th Cir. 1980) The Baker court said:

> "The IBLA exceeded its discretionary and statutory powers when it adopted its too much or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.
>
> Conclusion
>
> "In sum, we hold that the IBLA's adoption of the too much rule was an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious."

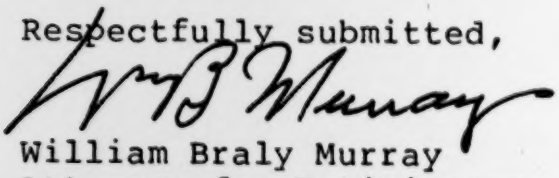
Both the Court of Appeals and the District courts below erred by affirming rejection of plaintiff's claims based on the "too much" rule. The Hearing Examiner found that the contested claims contain enough reserves to last 121 years at the present rate of 400,000 tons a year production. A-43.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari be granted and the case be reviewed on the merits.

Dated: January 13, 1981

Respectfully submitted,



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Supreme Court, U.S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

80-1181

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR. THE DREDGE CORPORATION, a Nevada corporation, and THE ESTATE OF OLAF H. NELSON,

Petitioners,

v.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. 77-3429

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and OLAF H. NELSON, Plaintiffs-Appellants,	)
v.	)
JOHN F. BOYLES, District Manager, Bureau of Land Management; WILLIAM J. MALENCIK, Chief, Division of Technical Services, et al., Defendants-Appellees,	)
SMALL TRACT APPLICANTS ASSOCIATION, Intervenor.	)

CA No. 77-3429

DC No. CV-LV 74-68 RDF

MEMORANDUM July 10, 1980

Appeal from the United States District Court for the District of Nevada

Before: HUG and FARRIS, Circuit Judges, and McNICHOLS, * District Judge

William McCall, The Dredge Corporation, and the Estate of Olaf Nelson (McCall) appeal the dismissal on summary judgment of their suit seeking review of the de-

*Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

cision of the Interior Board of Land Appeals that their mining claims were invalid because they did not contain valuable mineral deposits. McCall contends 1) that the board improperly applied the test for determining whether a mineral deposit was valuable and 2) that in any case the board's decision is not supported by substantial evidence. We affirm.

In 1953, McCall applied for a patent to a group of twenty-six mining claims in the Las Vegas valley, asserting that the claims were valuable for sand and gravel. Patents were issued for portions of five of the claims on which mining had taken place prior to July 23, 1955. In 1960 and 1961 contest complaints were filed challenging the validity of the remaining twenty-one claims. A hearing examiner found the claims to be invalid because no discovery of valuable mineral deposits had been made on the claims prior to July 23, 1955. The Interior Board of Land Appeals, acting on behalf of the Secretary of the Interior, affirmed. United States v. McCall, 2 IBLA 66, 78 I.D. 71 (1971). In 1974, McCall filed this suit for injunctive and declaratory relief in district court seeking review of the board's decision. The district court granted the Secretary's motion for summary judgment and McCall appeals.

Under 30 U.S.C. Sec. 22, any citizen may explore, occupy and purchase federal lands containing valuable mineral deposits. A mineral deposit is "valuable" if it meets the "prudent man" test as refined by the "marketability test.

> Under this "prudent-man test" in order to qualify as "valuable mineral deposits," the discovered deposits must be of such a character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . ." Castle v. Womble, 19. L. D. 455, 457 (1894).

United States v. Coleman, 390 U.S. 599, 602 (1968). under the marketability test

> "'a mineral locater . . . must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit'."

Verrue v. United States, 457 F2d 1202, 1203 (9th Cir. 1972), quoting Foster v. Seaton, 271 F2d 836, 838 (D. C. Cir. 1959). On July 23, 1955, Congress removed common varieties of minerals from the applicability of the mining laws. 30 U.S.C. Sec. 611. Thus to establish the validity of claim for a common variety mineral, the claimant must show that the mineral deposit was "valuable" before July 23, 1955. McCall does not dispute that the sand and gravel on his claims is a common variety.

McCall contends that the board improperly spplied the marketability test by requiring McCall to show that material from the claims had been actually marketed

at a profit. In Verrue v. United States, supra, we held that absence of exploitation by itself did not make a claim invalid. However, the board here based its ruling on the absence of evidence "to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955." and not on the absence of exploitation by itself. 2 IBLA at 75, 78 I.D. at 80. In Melluzzo v. Morton, 534 F 2d 860 (9th Cir. 1976) we held that the lack of exploitation, along with cost of extraction and level of local demand, was a relevant consideration in determining whether a mineral deposit was valuable under the marketability test.

McCall argues that the board acknowledged in United States v. Gibbs, 13 IBLA 382 (1973), that its ruling in this case was wrong. We disagree. In Gibbs the board indicated only that the language in its McCall opinion may have been misleading and clarified that the claimant must show, not a demand for minerals specifically from his claim, but "that material from his specific claim can supply an existing market demand for such material at a profit." 13 IBLA at 394. The board had properly applied this test when it found that claims here contested contained sand and gravel overlain with a layer of hard cemented gravel and that McCall had not shown that this sand and gravel covered by cemented gravel could have been profitably mined to supply the existing demand for sand and gravel.

McCall also contends that the board's decision is not supported by substantial evidence. Although the government must first make a prima facie showing of in-

validity, McCall had the burden of proving the discovery of valuable mineral deposits. United States v. Springer, 491 F2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974). The government presented an expert witness who examined the claims in 1959, 1963 and 1965. He testified that there was no evidence of any mining on the claims prior to his 1959 examination. The claims contain sand and gravel covered by a cemented gravel capping that can be mined only by expensive blasting and drilling. Nearby claims where gravel was being mined have much less cemented gravel. Some of the contested claims also have a large amount of "fines" which would not meet road specifications. The expert testified that in his opinion, consideraing the prudent man and marketability tests, a valid discovery of a valuable mineral deposit had not been made on any of the contested claims. A second government expert who examined the claims in 1963 agreed that there was too much blow sand and cementation to support profitable operations.

This testimony constitutes substantial evidence that the government established a prima facie case. Hallenbeck v. Kleppe, 590 F2d 852 (10th Cir. 1979). It is supported by testimony of McCall's witnesses, Wells and Bradley. Wells stated that the economics of the situation precluded the use of blasting to break cemented gravels prior to 1957, and Bradley stated he did not know of the removal of any significant amounts of material from the contested claims prior to 1955.

The evidence favorable to McCall established at best that small amounts of sand and gravel had been removed from the claims in 1948 and mixed with sand and gravel from another site, that there was a market for sand atd gravel in the Las Vegas area in 1955, and that in the opinion of some local operators, the claims could have been profitably exploited. The board held that McCall had not met his burden of proof. Viewing the record as a whole, we find that the board's decision is supported by substantial evidence. Multiple Use Inc. v. Morton, 504 F2d 448 (9th Cir. 1974).

Our opinion in Baker v. United States, 613 F2d 224 (9th Cir. 1980) does not control here. In Baker, the board had refused to grant a patent for the claims involved even though it had found that the deposits thereon met both the marketability and prudent man tests. We held that there was no statutory basis for the board's action. Here the board found that the deposits on McCall's claims did not meet the marketability test.

Affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM A. McCALL, SR. et al., Plaintiffs, v. JOHN F. BOYLES, et al., Defendants, SMALL TRACT APPLICANTS ASSOCIATION, Intervenors.	Civ LV 74-68 RDF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims, referred to herein as the "Las Vegas group" of claims, were located on March 20, 1948, by Vernon C. Bradley, John W. Bonner, N. D. Bradley and G. C. Bradley. (2 IBLA at 66, hrng ex., p. 1) 1/

2. Each of the claims embraces an area of 80 acres, and in toto, the group of claims encompasses 1,680 acres of land in T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. (2 IBLA at 66; hrng ex. p. 1)

3. The claims are within five miles from the center of the City of Las Vegas, Nevada. (2 IBLA at 67; hrng. ex. p. 1)

4. On June 1, 1948, the four original locators released and quitclaimed their interests in the Las Vegas group of claims to O. H. Nelson who, on September 24, 1952, conveyed a one-half interest in the claims to William A. McCall, Sr. (2 IBLA at 67; hrng ex. p. 1)

1/ Citations to the administrative record include references to the decision of the Interior Board of Land Appeals of March 22, 1971, in United States v. William A. McCall, Sr. et al., 78 I.D. 71, 2 IBLA 64 ("2 IBLA"); the decision of the hearing examiner of August 15, 1968, in the same matter ("hrng. ex."); the transcript of the administrative hearing in the case ("T"); and exhibits introduced in evidence at that hearing.

5. On March 27, 1953, Nelson and McCall filed application Nevada 012928 for patent to the Las Vegas group of claims (including in addition to those previously identified, the Las Vegas Nos.1, 2, 7, 18 and 27 claims, which are not involved here). (2 IBLA at 67; hrng. ex., p. 1)

6. On March 27, 1959, the Las Vegas No. 23 claim was conveyed by quitclaim deed to the Dredge Corporation (2 IBLA at 67; hrng. ex., p. 1).

7. A final certificate was issued for the claims in the Las Vegas group on October 8, 1954. (2 IBLA 67; hrng. ex., p. 1)

8. Patents were issued in 1960 and 1964 for all or parts of the Las Vegas Nos. 1, 2, 7, 18 and 27 mining claims. (2 IBLA at 67.)

9. The lands in the Las Vegas group of claims, with the exception of the Las Vegas No. 23 claim, were classified for disposal under the Small Tract Act, 43 U.S.C. 682, by Classification Order No. 95 of October 2,1953 and the land embraced in the Las Vegas No. 23 claim was similarly classified by Order No. 130 of September 10, 1957. (Hrng. ex., p. 1; Ex G-1 through G-6.)

10. On March 13, 1960, contest complaints, identified as Nevada 3092-3095, 3097-3106, and 3108-3113, were issued by the Reno, Nevada, land office against the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26 placer mining

claims on charges that the land within the limits of each claim is nonmineral in character and that no discovery of a valuable mineral has been made within the limits of the claims because the materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials. (2 IBLA at 67; hrng. ex. p. 2.)

11. On June 1, 1961, contest complaint No. Nevada 3224 was issued against the Las Vegas No. 23 claim on charges that the land embraced in the claim is nonmineral in character and that no discovery of a valuable mineral has been made within the limits of the claim because no actual market for the mineral materials claimed existed before July 23, 1955, and these mineral materials are not considered a valuable mineral deposit under section 3 of the Act of July 23, 1955 (2 IBLA at 67; hrng. ex., p. 2)

12. A hearing on the charges of all of the contest complaints was held at Las Vegas, Nevada, on April 20-23, 1965. (2 IBLA at 68; hrng. ex. p. 2)

13. At the hearing, George O. Scarfe, a valuation engineer employed by the Bureau of Land Management, testified on behalf of the contestant substantially as follows:

(a) By himself, he made several examinations of the Las Vegas group of mining claims in June, July and August 1959, and, in the company of Lewis G. Chichester, the assistant land office manager for the Branch of Mining, Nevada land office, he examined the claims

again in July 1963 and January 1965;

(b) The claims lie on an alluvial fan at an elevation of approximately 2,500 feet, the alluvium consisting mostly of limestone fragments, ranging in size from boulders to silt, with some aeolian deposits in the top one foot;

(c) A caliche capping is present, varying from exposure at the surface to a depth of four feet; there is loose sand and gravel above the caliche throughout the area of the claims, as well as rework gravel in the washes which cross the claims; the caliche consists of a calcareous cement on the limestone deposits, formed by evaporation of the ground water;

(d) The caliche capping can be broken by blasting, and, after treatment, the rock can be used as ordinary gravel;

(e) The material on the claims is similar to that found extensively in the Las Vegas Valley and is suitable for base course filling in highway construction, bituminous mix and concrete aggregate;

(f) A sketch map of sections 15, 22, 27 and 28, T. 20 S., R.60 E., showed the location of the Las Vegas group of claims, the depth of surface sand and gravel above the caliche layer development workings such as shafts, trenches and bulldozer cuts on each claim and surface improvements such as roads and power lines, as they existed on September 20, 1959; The shafts were dug by means of blasting and backhoe excavation, and the trenches were dug by hand;

(g) There was no evidence of any mining on the contested claims prior to Scarfe's examination of the claims in 1959;

(h) Another sketch map depicting the same area as of July 31, 1963, showed the location of 64 pits which had been dug as additional development work after 1959;

(i) Examination of the new shafts showed much silt-like lacustrine deposits in the Las Vegas Nos. 3, 4, 5, and 6 claims; the caliche-cated material exposed in the shafts could be mined but would require more treatment at greater expense to make it satisfactory for use as aggregate;

(j) Considerable mining had been done recently at a pit on the Las Vegas Nos. 12 and 13 claims where material had been screened and stockpiled on the claims, some finished material having been hauled during the examination of the claims; the screening had developed a large amount of "fines," which do not meet road specifications;

(k) The pit operation on the Las Vegas Nos. 12 and 13 claims had been blasted through the caliche, with the excavation about 20 feet deep at which depth another layer of dense cementation was encountered; the gravel was, however, mineable;

(l) Most of the material on the contested claims, excepting the lake-bed material and the caliche capping, would make specification gravel, but any opera-

tion prior to 1959 would have been compelled to break the caliche by drilling and blasting before excavation would be possible, which activities would have greatly increased the overall cost to obtain usable gravel;

(m) The competitors operating in neighboring pits are mining gravels having much less caliche-cement, although, ovarall, the material on the Las Vegas claims is very much similar to that found widespread throughout the Las Vegas Valley area; the material on the claims has no special or distinct characteristics or properties which make the deposit unique;

(n) One shaft on each claim was sampled for gold, with negative results in each instance;

(o) In the opinion of the witness, a valid discovery had not been made on any of the contested claims. (2 IBLA at 68-69).

14. Lewis G. Chichester, on behalf of the contestant, testified substantially as follows:

(a) He accompanied Scarfe in his examination of the claims in July 1963 and would have given substantially the same answers as Scarfe gave to the questions propounded to the latter;

(b) With respect to the Las Vegas No. 23 claim, which Scarfe did not examine, insufficient exploration work has been done by the claimants to establish the quantity and quality of the material

present;

(c) But for the limitations of the Act of July 23, 1955, 30 U.S.C. 611 et seq., the Las Vegas Nos. 5, 12 and 13 claims might be considered valid locations, as they can be operated in the present (1965) Las Vegas area market for sand and gravel; all the other claims have too much blow sand and caliche cementation to support any profitable operations, even if they were presently subject to mining location. (2 IBLA at 70;).

15. Vernon D. Bradley, one of the original locators of the Las Vegas group of claims, on behalf of the contestees, testified substantially as follows:

(a) In 1948 he was the major producer of sand and gravel in the Las Vegas Valley, and he located the Las Vegas group of claims as future reserves for his plant on the Best Bet placer mining claim in section 27, T.20 S., R. 60 E, which claim has since been patented;

(b) He had done the necessary discovery work on each claim and had removed perhaps 50 to 100 yards of material from each claim;

(c) He sold the Las Vegas claims to Olaf Nelson and sold other adjacent claims to William McCall and to Wells Cargo Company;

(d) He was unable to state that Nelson had removed material from the contested claims, although much material was taken from the Las Vegas Nos. 1, 2, and 7 claims;

(e) He was hired in 1956 or 1957 by Nelson and McCall to dig exploratory holes on each 10-acre subdivision of each of the contested Las Vegas claims; the excavated material was run through the plant on the Best Bet claim and was used on a job at the Las Vegas City jail;

(f) Before washing plants were installed in the area, most gravel excavation was done in the bottom of dry washes where there was no excess of fines;

(g) He did not know of the removal of any significant amounts of material from the contested claims, although Nelson did take lots of material from the Las Vegas Nos. 1, 2, 7 and 18 claims for which patents were issued;

(h) He did not exploratory work on the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 claims while he owned them, but, in 1957, he dug small pits on each of the claims at the behest of Nelson;

(i) The Las Vegas claims have been used in the past as dumping grounds for excess unusable materials from other sources;

(j) The Las Vegas claims were located as a source of good gravel close to the City of Las Vegas but were not operated, because the Best Bet provided all the materials he needed for his operations in 1948.(2 IBLA at 70-71,).

16. Stanley Hansen, vice president and general manager of Wells-Steward Construction Company, testified on behalf of the contestees that (a) his company

had been operating on the Las Vegas Nos. 12 and 13 claims since 1963 but had done no work on the claims prior to 1963, (b) some 400,000 tons of material were extracted from the claims in 1964; (c) material on those claims could be processed into Type 1 and Type 2 material for roads and for plant mix surface, but from 3 to 7 percent was wasted as fines in screening for Type 2 material; and (d) hauling costs are a very important factor in supplying aggregate for road construction, and his company tries to keep the hauling distance under three miles. (2 IBLA at 71;).

17. Joe W. Wells, president of Wells Cargo Company, on behalf of the contestees, testified substantially as follows:

(a) He obtained title to the Best Bet claim in 1949 for a source of sand and gravel for local use, and he had an agreement dated March 24, 1959, with Nelson and McCall to obtain a 20-percent interest in the Las Vegas group of claims after doing the exploration work on each 10-acre subdivision of each claim;

(b) The exploration work cost approximately $25,000;

(c) The material on the Las Vegas claims would be processed into sand and gravel meeting all specifications for both highway and building construction;

(d) He was aware of operations on the Las Vegas claims since 1948 but had no specific knowledge as to work on any individual claim in the group;

(e) The cemented gravels on the claims could be broken by shooting and then processed to meet any standard specifications; such processing is more expensive, and, therefore, little production of such gravel occurred prior to 1959, but now a big ripper mounted on a heavy "cat" can break the cemented gravels;

(f) Water soaking is efficacious to dissolve the "cement," and smaller "cats" can be used for ripping after such soaking; it is cheaper to drill a water well and soak the cemented material in place than it is to shoot or dry rip;

(g) The economics of the situation precluded much blasting to break the cemented gravels prior to 1957, but there will be a much greater need for sand and gravel in the Las Vegas area in upcoming years, so that the Las Vegas claims are ideally situated to supply future construction needs in the area. (2 IBLA at 71;).

18. Howard Geer, an employee of J. M. Murphy Construction Company, testified on behalf of the contestees that Murphy had operated a plant from 1948 to 1952, producing Type 2 base material on the Las Vegas No. 18 claim, but he could not state that material was extracted from any other of the Las Vegas claims for that operation; he said all of the Las Vegas claims have sand and gravel. (2 IBLA at 71-72;).

19. Elton Stout, a contractor, testified on behalf of the contestees, that:

(a) He is operating a hot mix plant on the patented Homesite claim in Section 27, with his pit some 35 feet deep; he is of the opinion that the pit could be

deepened another 75 feet through good gravel, but such a depth would damage the property for other uses and would increase mining costs;

(b) He had tested materials on the Las Vegas Nos. 19, 20, 25 and 26 claims, finding a little hardpan on top but very good gravel below; the hardpan had been successfully broken by a D-9 cat with a ripper;

(c) In his opinion, the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 claims would be easier to mine as there is less hardpan in that area, and the gravel material is similar to that found throughout the whole area of the claims; there is no caliche on any of these claims, as caliche is never gravel; the cemented gravels are not caliche and can be broken by ripping with or without soaking, and then run through a crusher and screened into the type material desired. (2 IBLA at 72;).

20. Elvin Hitchcock, formerly employed by Vernon Bradley, stated that he would have given substantially the same testimony as Bradley. (2 IBLA at 72;).

21. William C. Harman, vice president of Wells Cargo, on behalf of the contestees, testified substantially as follows:

(a) He superintended the drilling of the pits on each 10-acre subdivision of the Las Vegas claims, excepting the Las Vegas No. 23, after Wells Cargo bought a 20-percent interest in the claims in 1959;

(b) The pits were drilled to a depth of 10 feet and shot, then cleared by

backhoe, the resulting pits being from 7 to 10 feet wide, 20 to 25 feet long and, at least, 12 feet deep;

(c) Sand and gravel were found in every hole, but with variations according to the location of the pit on the alluvial fan; that is, some pits had coarser and some had finer deposits, but all were substantially sand and gravel from top to bottom;

(d) The gravels from these claims are still able to meet the more stringent specifications now imposed;

(e) In his opinion, the cemented gravels, after crushing, are equally as good as loose gravels for either road or other construction;

(f) At the present time (1965), horticulture provides a market for the excess fines recovered from screening operations;

(g) The highly cemented gravel is actually a variable conglomerate and resembles concrete when broken; there are no true caliches in the Las Vegas claims, only cemented gravels. (2 (IBLA at 72-73;).

22. By a decision of August 15, 1968, the hearing examiner held all of the contested claims to be invalid.

23. The decision of the hearing examiner was affirmed by the Interior Board of Land Appeals on March 28, 1971, in United States v. William A. McCall, et al., 78 I.D. 71, 2 IBLA 64.

24. The decision of the Board of Land Appeals constitutes final administrative action in this matter.

Conclusions of Law

1. In finding plaintiffs' mining claims to be invalid, the Interior Board of Land Appeals applied judicially-approved legal standards.

2. The decision of the Board of Land Appeals is supported by substantial evidence in the record.

Dated this 15th day of June, 1976.

/s/ Roger D. Foley
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

WILLIAM A. McCALL, Sr., THE DREDGE CORPORATION, a Nevada corporation, and OLAF H. NELSON,

Plaintiffs,

vs.

JOHN F. BOYLES, District Manager, Bureau of Land Management; WILLIAM J. MALENCIK, Chief Division of Technical Services, Bureau of Land Management; E. I. Rowland, State Director, Bureau of Land Management; BURTON W. SILCOCK, Director, Bureau of Land Management; ROGERS B. MORTON, Secretary of Interiork Department of the Interior, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,

Defendants.

Civil LV 74-68 RDF

ORDER ON MOTION TO RECONSIDER SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

August 17, 1977

Plaintiffs filed an action for declaratory and injunctive relief requesting this Court to set aside a decision of the Secretary of the Interior, in the case of U.S.v. McCall, et al., 78 I.D. 71, 2 IBLA 64 (Mar. 22, 1971), in which the Board affirmed a hearing examiner's determination that certain placer mining claims in Clark County, Nevada, were null and void for lack of a discovery of a valuable mineral deposit on any of the claims.

This case was referred to Magistrate Ward and, upon his recommendation, this Court granted summary judgment in favor of the defendants. The plaintiffs are now before this court on a motion for reconsideration of the judgment in favor of the defendants.

Magistrate Ward recommended that the dicision of the Secretary of the Interior be upheld because the proper legal standards were applied in determining the validity of the claims and the decision was supported by substantial evidence in the administrative record considered as a whole.

The deposits claimed were sand and gravel. The Secretary had decreed these to be "common varieties." Under Section 611 of 30 U.S.C., common variety minerals

were withdrawn from location under the mining laws. 1/ As a result thereof, in order for the plaintiffs to have prevailed they would have had to demonstrate that the requirements of discovery were met before July 23, 1955, the effective date of 30 U.S.C. §611.

In order to satisfy the requirements of discovery, it must be demonstrated that the deposits were "Valuable." A mineral is valuable if the requirements of the "prudent man test" 2/ and its complement and refinement, the "marketability test" 3/ are met. See Barrows v. Hickel, 447 F 2d 80 (9th Cir. 1971); Verrue v. United States, 457 F2d 1202 (9th Cir. 1972); Multiple Use, Inc. v. Morton, 504 F2d 448 (9th Cir. 1974); Clear Gravel Enterprises, Inc. v. Keil, 505 F2d 180 (9th Cir. 1974); Humboldt Placer Mining Co. v. Secretary of the Dept. of the Interior, 549 F2d 622 (9th Cir. 1977); and Block v. Andrus ___F2d _____(9th Cir. 1977).

The basic facts were not in dispute. Plaintiffs' claims involved 21 placer mining claims denoted as Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26. Each claim included 80 acres, and in total the contested claims encompassed 1,680 acres.

These claims were located by Mr. Bradley and others on March 20, 1948. On June 1 of that same year, title to all the contested claims was conveyed to O. H. Nelson. Subsequently, on September 24, 1952, one-half of the contested claims were conveyed by O. H. Nelson to Mr. McCall. On March 24, 1953, O. H. Nelson and Mr. McCall applied for

mineral patents on the claims. Claim 23 was conveyed to the Dredge Corporation on March 27, 1959.

On March 18, 1960, the United States initiated contests to all of the claims, except 23, alleging that"

(1) the land within the limits of each claim was non-mineral in character; and
(2) no discovery of valuable minerals had been made within the limits of the claims because:
    (a) the materials present therein could not be marketed at a profit, and
    (b) it had not been demonstrated that there existed an actual market for the materials.

On June 1, 1961, the United States initiated a contest to claim 23, contending that:

(1) the land within the claim was non-mineral in character; and
(a) no discovery of valuable minerals had been made within the limits because no actual market had existed before July 23, 1955.

A hearing on the complaints was held in Las Vegas on April 20, 1965. After considering the quality and quantity of the material, costs of extraction and removal, existence and size of the market, unit prices then prevailing, and hauling costs and distances, the hearing examiner rendered his decision on August 15, 1968, finding that all the said unpatented placer mining claims were invalid and that any market, if in fact one did exist for the material on the claims, came

after July 23, 1955. The plaintiffs appealed the hearing examiner's decision and on March 22, 1971, the decision was affirmed by the Secretary of the Interior.

On May 8, 1974, a complaint was filed in this court requesting that the decision of the Secretary be set aside. Subsequently, the parties filed cross motions for summary judgment. The case was referred to Magistrate Ward and on June 7, 1976, he recommended that the defendants were entitled to judgment as a matter of law. On June 15, 1976, this Court adopted the defendants' proposed findings of fact and conclusions of law and granted the defendants' motion for summary judgment. The case is presently before this Court on a motion to reconsider the summary judgment in favor of the defendants.

The plaintiffs argue that the summary judgment should be reconsidered because the recommendation was tainted by two errors, namely:

(1) The Magistrate misread the case of U. S. V. Gibbs, 13 IBLA 382 (1973), and

(2) The Magistrate erroneously held that a change in the law should not be given retroactive effect.

On page 2 of the Magistrate's opinion, he misquoted the case of U.S. v. Gibbs, 13 IBLA 382 (1973) as follows:

> "It is well established that the holding of a mining claim as a reserve of sand and gravel for further development with the present market does not impart validity to the claim."

The proper quotation is as follows:

> "The question of the propriety of holding mining claims as reserve sources of supply has been considered in other cases. It is well established that the holding of a mining claim as a reserve of sand and gravel for future development without present marketability does not impart validity to the claim." (emphasis in original) 13 IBLA at 396.

Plaintiffs contend that the Gibbs case clearly worked a change of law as far as the present action was concerned. They suggest that if the standards set out in Gibbs were applied to their case the hearing examiner might have reached a different result. There was testimony in the record that the claims were located for reserves (Tr. p. 276). Therefore, they argue, the difference between "with" and "without" is absolutely critical to the present action.

On the issue of the propriety of holding mining claims as reserves, the Gibbs decision went on to hold that:

> "The location of claims for the purpose of securing reasonable reserve supplies is not prohibited by the United States mining laws, but claims so located must meet the same standards and pass the same tests of validity as other claims, including a showing of marketability on or before July 23, 1955." 13 IBLA at 397.

This Court reads the Gibbs decision as standing for the proposition that the single fact that a claim is held as a reserve (i. e., no proof of sales from the claim in question) does not per se impart invalidity. However, neither does it validate a claim which would otherwise be invalid due to a failure to satisfy the prudent-man and marketability tests. Viewing the record as a whole, there is ample evidence that the hearing examiner considered other factors in addition to the lack of sales in deciding that the plaintiffs did not meet the prudent-man or marketability tests.

Next, the plaintiffs contend that the Magistrate erred in declining to find that the Gibbs case should be given retroactive effect. They rely on his first conclusion of law which stated:

> "1. There is inadequate support in the record or pleadings herein for the proposition that U.S. v. Gibbs, 13 IBLA 382 (1973) established new standards that should be given retroactive effect in plaintiffs' case."

Plaintiffs, in their interpretation presuppose the Gibbs decision established new standards that would be relevant in their case. Clearly, if new standards were established, this Court would give them retroactive effect. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). However, it is the judgment of this Court that the Gibbs case effected no new standards in the controversy at bar.

The plaintiffs argue that the Gibbs decision clearly worked a change of law as far as the present action was concerned. They rely on the following quote from Gibbs:

> "Another oft-stated misconception, encountered again in this case, is the proposition that 'To satisfy the marketability test, a mining claimant must show the existence of a demand for the material on his specific claims, and not simply a general demand for the type of material in question.' 7/ " (emphasis in original)
>
> "7/ We must acknowledge our own contribution to the perpetuation of this fallacy." (citations omitted) 13 IBLA at 393.

As a result of Gibbs, the plaintiffs contend, a mining claimant need only show that there is a general demand for the type of material in question, namely sand and gravel. Gibbs, however, goes on to explain:

> "The origin of this misconception seems to lie in the inversion by restatement of the perfectly valid proposition to the effect that a mining claimant must show that material from his specific claim can supply an existing market demand for such material at a profit. . . . . This is altogether different from requiring the claimant to show the existence of a demand for the material from his specific claim." (emphasis added) 13 IBLA at 394.

Requiring a claimant to demonstrate that a demand exists for the particular sand and gravel on his claim would impose an unreasonable burden on him. With respect to satisfying the prudent-man and marketability tests, Gibbs indicates that purchasers of ordinary sand and gravel are not concerned which claim supplied their demands so long as the material was legally obtainable and the price was competitive. The Gibbs decision states:

> "Those whose demands create the market are unlikely even to be aware of a particular claim as an undeveloped potential source of supply, and, if they were, it is unlikely that they would generate a demand for the produce of that specific claim in the absence of a critical shortage." 13 IBLA at 394.

Thus the claimant must still satisfy the prudent-man and marketability tests, namely, that it can be demonstrated that the material from his claim can supply an existing market demand for such material at a profit. As this Court noted in McCall v. Morton, LV 74-70 RDF (1975), at page 5:

> "Gibbs seems to be saying that a claimant need not show that there is a demand for the specific material from a specific claim; this would be an impossible burden. But, the claimant still must show that material from his claim can supply an existing market demand for such material at a profit." (emphasis in original)

Thus, this Court has not been persuaded that the Gibbs decision established any new standards. Therefore, no question of retroactivity arose.

As such, the summary judgment entered on June 15, 1976, in favor of the defendants and against the plaintiffs shall stand.

DATED: August 17, 1977.

/s/ Roger D. Foley
DISTRICT JUDGE

FOOTNOTES

1. "No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws; ..." 30 U.S. C. §611

2. Under the "prudent-man test" the inquiry is whether the deposits were of such character as to justify a man of ordinary experience in expending further labor and means with a reasonable prospect of success in developing a valuable mine.

3. Under the "marketability test" the inquiry is whether the mineral could be extracted and marketed at a profit.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM A. McCALL, SR., et al., Plaintiffs, v. JOHN F. BOYLES, et al., Defendants.	Civ LV 74-68 RDF JUDGMENT June 15, 1976

Judgment is hereby entered that the plaintiffs take nothing and that the action be dismissed on the merits.

Dated this 15th day of June, 1976.

/s/ Roger D. Foley
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and OLAF H. NELSON, Plaintiffs-Appellants,	)
v.	)
JOHN F. BOYLES, District Manager, Bureau of Land Management; WILLIAM J. MALENCIK, Chief, Division of Technical Services, et al., Defendants-Appellees,	)
SMALL TRACT APPLICANTS ASSOCIATION, Intervenor.	)

CA No. 77-3429
DC No. CV-LV 74-78-RDF

ORDER
Filed Oct. 17, 1980

Before: HUG and FARRIS, Circuit Judges, and McNICHOLS,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Farris have voted to reject the suggestion for a rehearing en banc.

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*Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of Hearing Examiners
4209 Federal Building
Salt Lake City, Utah 84111

August 15, 1968

DECISION

UNITED STATES OF AMERICA, Contestant	Nevada 3092-3095, 3097-3106, 3108-3113, and 3224
v.	
WM. A. McCALL	
THE DREDGE CORPORATION,	
ESTATE OF OLAF H. NELSON, Contestees	Involving the Las Vegas Nos. 3 thru 6, 8 thru 17, 19 thru 23, 25 and 26 unpatented placer mining claims, situated in Secs. 15, 22, 27, 28 and 29, T. 20 S. R. 60 E., Mt. Diablo Meridian, Clark County, Nevada.
SMALL TRACT APPLICANTS ASSOCIATION, Intervenor	

APPLICATIONS FOR PATENT REJECTED; MINING CLAIMS HELD TO BE VOID.

This proceeding involves 21 placer mining claims encompassing 1,680 acres of land, situated within five miles from the center of the City of Las Vegas, Nevada. The claims were located on March 20, 1948, by V. D. Bradley et al., and conveyed on June 1, 1948, to O.H. Nelson, whose estate is one of the contestees. On September 24, 1962, O.H. Nelson conveyed a one-half interest in the claims to William A. McCall and on March 24, 1953, Mr. Nelson and Mr. McCall filed an application for patent, Nevada 012928, to all of the claims except the Las Vegas 23. A final certificate was issued to the applicants by the Bureau of Land Management on October 8, 1954. On March 27, 1959, the Las Vegas No. 23 claim was conveyed by quitclaim deed to the Dredge Corporation. 1/

The lands in all of the contested claims, except Las Vegas No. 23, were classified for disposal under the Small Tract Act (43 U.S.C. 682) by Classification Order No. 95, dated October 2, 1953 (Government exhibit 1). Certain modifications and revocations of Oreder No. 95 were made by Orders dated September 20, 1958; January 28, 1960; March 16, 1961; and October 6, 1961 (Government exhibits 2, 3, 4 and 5). The lands embraced in the Las Vegas No. 23 claim were similarly classified for disposal under the Small

---

1/ A separate action was instigated against this claim as an adverse proceeding under Contest Nevada 3224, which was consolidated with the patent application proceedings by Secretary's decision A-29161 (July 30, 1962).

Tract Act by Order No. 130, dated September 10, 1957. (Government exhibit 6).

The Contestant filed, on March 18, 1960, separate complaints against each of the claims, except the Las Vegas No. 23, alleging that:

1. The lands within the limits of the claims are nonmineral in character.
2. No discovery of a valuable mineral has been made within the limits of the claims because material present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

The Contestant's complaint against the Las Vegas No. 23 claim was filed on June 1, 1961, and alleged that"

1. The land embraced within the claim is nonmineral in character.
2. No discovery of a valuable mineral has been made within the limits of the claim because no actual market for the mineral materials claimed existed before July 23, 1955. These mineral materials are not considered a valuable mineral deposit under section 3 of the Act of July 25, 1955; therefore, any market for such materials developed after that does not constitute a valid discovery within the mining laws.

Timely answers were filed and a hearing on these contests was held on April 20 through April 23, 1965, in Las Vegas, Nevada.

Motion to Dismiss Contest Under the Act of March 3, 1891

Contestees moved to dismiss the complaints on the ground that the Department had no authority to contest their claims because more than two years had elapsed since the issuance of a final certificate of mineral entry on March 7, 1955. As authority, they cite Section 7 of the Act of March 3, 1891 (26 Stat 1095; 43 U.S.C. 1165), which reads:

> Provided, That after the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under the Act of March 3, 1891, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him . . . . (Underscoring added.)

With respect to mining claims, the courts have considered this same contention and have rejected it. In Cameron v. United States, 252 U.S. 450 (1920), the United States Supreme Court stated:

> Of course, the land department has no power to strike down any claim arbitrarily, but so long as legal title remains in the Department it does have power, after proper notice and upon adequate hearing to

> determine whether the claim is valid and, if it be found invalid, to declare it null and void. . . . The party who makes proofs, which are accepted by the local land officers, and pays his money for the land has acquired an interest of which he cannot be arbitrarily dispossessed. . . . The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department . . . . In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed. (Underscoring added.)

This doctrine has been expressly reaffirmed in Union Oil Company of California v. Udall, 289 F2d 790 (D. C. Cir. 1961), affirming Union Oil Company of California et al., 65 I.D. (1958); Duguid v. Best, 291 F 2d 235 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963); Adams v. United States, 318 F 2d 861 (9th Cir. 1963). See also Ickes v. Underwood, 141 F 2d 546 (D. C. Cir. 1944); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963).

The issuance of the "final certificate" to the Contestees on the contested claims did not cut off the right of the United States to question the Contestees' right to a patent and the right to determine whether the claims are valid and if

found to be invalid, to deny the patent application ahd declare the claims to be void. The contestees contend that the Cameron case is overruled by Stockley et al. v. United States, 260 U.S. 532 (1923), where it is stated:

> The plain provision is that the period of limitation shall begin to run from the date of the "issuance of the receiver's receipt upon the final entry.". . . . Having submitted to the proper officials proof showing full compliance with the law and having paid all the fees and commissions lawfully due, Stockley had done everything which the law required on his part and became entitled to the immediate issuance of the receiver's receipt, and this receipt was issued and delivered to him, no subsequent receipt was contemplated nor required. From the date of the receipt, the entry may be held open for the period of two years, during which time its validity may be contested. Thereafter the entryman is entitled to a patent and the express command of the statute is that "the same shall be issued to him."

What the Contestees refuse to recognize is that the Stockley case applies only to tracts of public land entered under the homestead, timber-culture, desert-land, or pre-emption laws, or under the Act of March 3, 1891. The Act of March 3, 1891, makes no reference, directly or indirectly, to entries under the United States mining laws. The

Cameron case has not been overruled by the Stockley case, for they are not analogous.

The motion to dismiss is denied.

Motion to Deny the Intervention of the Small Tract Applicants Association

At the hearing, Mr. Howard Greene, the president of an association consisting of a group of holders of small tract applications to various tracts of lands within the confines of the claims in issue, requested that the association be allowed to intervene. The Contestees objected on the ground that, since the classification orders authorizing the disposal of the land as small tracts had been revoked pending disposition of these contests, the small tract applicants had no present standing or interest which could be affected by a decision.

Prior to 1956, the regulations stated, "No person shall be allowed to intervene in any case except on application therefor, under oath, showing his interest therein." The present Departmental regulations contain no specific provisions for intervention in Government contests. One cannot presume, however, that deletion of the provision allowing intervention by parties having an interest in land denies the right of intervention in all cases, for no person may be deprived of property without the due process of law. Common sense and jsutice require that a person who may have some interest in lands which could be affected by a decision regarding that land be allowed to participate in the

evidentiary proceedings resulting in a decision. And, further, that he be allowed to appeal any decision which may adversely affect his right.

Since the 1956 revision of the Rules of Practice, the right of a proper party to intervene in a contest proceeding has been recognized by the Department and the Courts. In United States v. Everett Foster, 65 I.D. 1 (1958), the Department held that it was proper to allow small tract applicants to intervene in a contest against mining claims covering land for which they had applied. Upon review, the United States Court of Appeals for the District of Columbia held that the small tract applicants were interested parties and that there was no basis for disturbing the Department's action. Foster v. Seaton, 271 F2d 836 (D. C. Cir. 1959). The right of small tract applicants to intervene in such contests was reaffirmed by the Department in United States v. The Dredge Corporation, A-28022 (December 18, 1959).

The question, then, is whether the small tract applicants to the land now in question have any right or interest entitling them to be protected.

Testimony was presented and exhibits were introduced showing that a lieu offer was made to the individuals having small tract applications in conflict with the mining claims, but that most of the applicants rejected that offer. They did this partly on the basis of a letter from J. R. Penny, Nevada State Director, Bureau of Land Management, in which he stated

that, "We will promptly reactivate your case when the status of the land is finally determined."

Mr. R. M. Zundell, Chief, Lands Adjudication, Bureau of Land Management, Nevada, by letter dated June 8, 1962, reinstated the applications. The applications are, of course, subservient to any prior right of the owners of the mining claims. But, if it is determined that the locators have, in fact, no prior rights, the small tract applicants' rights will be processed in due course. Contingent as the small tract applicants' rights are, these rights have value and the owners are entitled to participate in a hearing in which their rights may be affected.

The Small Tract Association, although a rather loose conglomerate of individuals, is the logical entity to be allowed intervention since its purpose is to protect the rights of the individual members in just such conflicts as now exist. Should each member be required to testify individually and be represented individually, the record would be unnecessarily lengthened.

The mining claimants' rights have not been or will not be prejudiced by the intervention of the small tract applicants. The request to deny continued intervention by the Small Tract Applicants Association, is, therefore, denied.

From the evidence presented at the hearing, I hereby make the following:

Findings of Fact

The claims in question are located approximately five miles west of the Las Vegas City Center, upon a gently sloping alluvial fan. This alluvial fan is described as a deposit of detrital material consisting of limestone fragments of boulder-size to fine sand and silt which has been washed out from the surrounding mountains by water and deposited in front of, and radiating from a canyon. Most of the surface of the claims are covered by blow or aeolian sand, about one foot in depth. Below this is a capping of cemented gravels which occasionally outcrops at the surface. Below the capping is a compacted deposit of sand and gravel extending to an undetermined depth. In the major washes coming through the area there is some reworked loose gravel on the surface.

The material on the claims has no special characteristics or properties as contrasted with other sand and gravel deposits in the Las Vegas Valley. Indeed, the entire valley can be classed as one huge gravel deposit. The material possesses no special or unique properties which would make it suitable for use other than general construction or general building purposes. In the Las Vegas Valley this material has been mainly used for base-course and bituminous mix for roads and streets and parking lots. Approximately 15 percent of the material has, and is now being used for making concrete. Gravel used for the latter purpose is screened, washed and mixed back, in right proportion as to size, with cement.

In their answers, the mining claimants alleged that gold values had been found. However, two Government geologists sampled one pit on each of the claims, processed the samples to a concentrate, and found no visible gold colors. This evidence was undisputed and it is clear that the only mining material on the contested claims is sand and gravel, for gold, if any exists, is too insignificant to merit consideration.

Mr. Vernon D. Bradley, the locator, testified that in 1948 he needed a reserve of sand and gravel. (Tr 276, 310, 315). He was then a major producer of sand and gravel and needed different types of material. His brother went through the dry washes with a portable shovel, testing to get material that would pass specifications to meet different construction projects. Some fine material, ideal for patching concrete, was found and removed from the Las Vegas 3 and 4. Approximately 500 total tons of material were sold from all of the 27 claims which he had located.

In 1956 or 1957, after the 21 claims in issue were sold, Mr. Bradley was hired by Mr. McCall and Mr. Nelson to dig a hole on every 10-acre tract. Material from the claims was hauled to the plant, run through the screen and delivered to the construction site. At that time there were no washing plants in the Las Vegas area and, because the fines could not be washed out, it was necessary to obtain material from the bottom of the dry washes. In fact, the reason Mr. Bradley located the 27 claims in 1948 was because he needed to pick and choose the material as the need arose. No work was done on the claims prior to 1957, ex-

cept for the small excavations in the washes. (Tr. 301-302).

At the time the claims in issue were located, the presence of cemented gravels near the surface was a detriment to the mining of gravel because it had to be blasted loose, thus raising the cost. Little or no drilling and blasting was done by the gravel operators in the Las Vegas area because the additional expense made it impossible to compete with the plentiful gravel found on areas within the valley that contained no cemented cappings. In about 1958, the gravel operators started to excavate cemented gravels by first watering the material and then loosening it with a ripper attached to a large caterpillar tractor. While this method costs a little more to mine, they found that cemented gravels can sometimes meet higher specifications than that which is noncemented. At the present time the major consideration in any decision as to the placement of a plant is the distance between the site of removal and the construction site. For, with the new methods of removal and the use of large tractors, the major expense is hauling the gravel, not mining it.

In the summer of 1964, the Wells Stewart Construction Company moved a gravel and asphalt hot plant onto the Las Vegas Nos. 12 and 13. In the following year, some 400,000 tons of gravel were removed from a pit averaging 12 feet in depth. Prior to that time, there was no production of any significance from any of the claims. The small amounts of material taken from the dry washes and used for patching material, as testified to by Mr. Bradley,

cannot be accepted as production sufficient to satisfy a finding that there was a market for the material on the claims. Since the entire Las Vegas Valley consists of alluvial deposits, sand and gravel from almost any place in the valley could be sold if it were screened, washed and mixed with material from an existing sand and gravel aggregate processing plant. Prior to the time washing plants came into use, the occurrences in the dry washes of fine sand or naturally segregated gravels would have values not possessed by the ordinary material found throughout the claims. In fact, the occurrences of several dry washes throughout the claims in all probability was the reason why Mr. Bradley located so many claims. He had no intention of mining any portion of the claims on which the cemented cappings occurred.

There is, at present, a market for a portion of the sand and gravel found upon these claims. A profitable operation now exists on the Las Vegas Nos. 12 and 13. However, there is no present market for all of the material found upon the claims in issue. These 21 claims encompass 1,680 acres. There are aproximately 1-1/2 tons of gravel in a cubic yard; using this figure as a basis, a 1,680-acre excavation, 12 feet deep, would yield 49,000,000 tons of sand and gravel. If the present yield of approximately 400,000 tons a year continues, the claims contain enough reserve for approximately 121 years. Mr. Bradley, ooperating on the adjacent homesite claim, has gone down to a depth of 35 feet, and, if gravel from the claims in issue was excavated to this depth, the

reserves at the present rate of production would last 363 years.

But, even taking judicial notice of the increasing demand for sand and gravel in the Las Vegas area and the present rate of population growth, the market is speculative. According to Mr. Stanley Hansen, 400,000 tons were taken off the Las Vegas Nos. 12 and 13 to fulfill a contract for the construction of a State Highway near the claims. Unless other equal size construction projects are obtained near the claim, the demand for sand and gravel would decrease. The sand and gravel operators in the Las Vegas Valley try to limit the distance of haul to two to three miles. Mr. Joe W. Wells, President of Wells Cargo, stated his company has acquired claims strategically located around the Las Vegas Valley from which sand and gravel could be hauled as the need requires. The claims in question comprise a fraction of the total acreage in the Las Vegas Valley located as mining claims for sand and gravel. Mr. McCall, one of the contestees, through the Dredge Corporation, owns or controls in excess of 10,000 acres of mining claims in the Las Vegas area. It surpasses belief that all of the claims in issue could be worked at the present time or in the reasonably forseeable future. The land encompassed by the claims has ever increasing value as real estate. The suspicion then arises, based upon a solid foundaton, that the claims are being held primarily for their real estate value. Extreme care must then be taken in evaluating the evidence and the laws to insure that the mining laws are not being subverted.

From the foregoing findings of fact, I hereby make the following;

Conclusions of Law

the first issue raised by the complaint is whether the lands upon which the claims are located are nonmineral in character. A review of the case shows that this issue is subsidiary to the second issue raised, i.e., whether discoveries of valuable minerals have been made. If no discoveries have been made by the locators, it would be inappropriate to classify the lands as mineral lands. This principle was cited by the Department in the case of John DeBevoise, 67 I.D. 177 (196) in which it was stated:

> In the determination as to whether land is mineral or nonmineral in character, the Department has followed the standard set forth by the United States Supreme Court in Davis's Administrator v. Weibbold, 139 U.S. 507 (1891), at p. 519:
>
> "* * * The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

The claims in question are located for sand and gravel. The Department, in the case of Layman et al. v. Ellis, 52 I. D. 714 (1929) held that gravel which is used for the arts and valuable for the purpose of manufacture is a mineral. However, this decision also holds that only if the gravel can be removed and marketed at a profit can lands containing deposits of gravel be classified as mineral lands subject to location and entry under the mining laws. This same marketability rule has been the test as applied by the Department and the Courts in determining whether a discovery exists on a placer claim located for sand and gravel. See Solicitor's Opinion, 54 I.D. 294 (1933); U.S. v. Everett Foster et al., 65 I.D. 1 (1958); Osborn v. Hammitt, Civil No. 414 August 19, 1964); United States v. Alfred E. Coleman et al., 390 U.S. 599 (decided April 22, 1968), rehearing denied May 28, 1968. It would follow, therefore, that if a discovery for sand and gravel has been made upon the claims, ipso facto, then the land containing the gravel must also be found to be mineral in character. A determination of the first issue raised in the complaint is, therefore, dependent on the findings and conclusions with respect to the second issue.

One of the prerequisites to the location of a valid mining claim is the discovery within the limits of the claim of a mineral or minerals sufficient to justify a prudent man in the further expenditure of his time and money in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Cameron

v. United States, 252 U.S. 450 (1920).

The above-cited "prudent man" rule has always been adhered to where the mineral is of intrinsic value and of limited occurrence. However, in cases involving claims located for nonmetallic minerals of widespread occurrence, the rule has been clarified by employment of the so-called "marketability test" as expressed in Foster v. Seaton, 271 Fed. 836 (D. C. Cir 1959) as follows:

> With respect to widespread nonmetallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for the purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit."

On July 23, 1955, Congress amended the mining laws to exclude from location deposits of common varieties of sand, stone, gravel, pumice, pumicite or cinders (30 U.S.C. 611). This act, commonly known as the Multiple Use Act, did not void claims located for common varieties of minerals prior to July 23, 1955, but the Department, in a series

of decisions, has consistently held that, to satisfy the requirements of a discovery on a sand and gravel mining claim, the market for the material must be shown to have existed prior to its passage. In the case of United States v. Nick Chournos, A-28577 (July 14, 1961), the Department stated:

> It is, of course, well established . . . that under the mining laws of the United States only "valuable mineral deposits" in public lands are subject to location and the lands in which they are found to occupation and purchase (30 U.S.C. 1958 ed. secs. 22 and 23). Sand and gravel have been recognized as locatable minerals under the mining laws . . . But when such materials are fully exposed to view or are of the same nature as prevailing exposures in the vicinity, a characterization of a deposit as a valuable mineral deposit is dependent upon a showing that profitable extraction, removal and disposal are possible because of accessibility, bona fides in development, proximity to market, existence of a present demand and other factors . . . . And to validate a placer mining claim located for sand and gravel before July 23, 1955, it must be shown that all requirements for discovery, including a showing that these materials can be extracted, removed and marketed at a profit must have been satisfied before that date. . . . .

Recently, the "marketability rule" as first promulgated in U.S. v. Everett Foster et al., supra, was affirmed by the United States Supreme Court in United States v. Alfred E. Coleman et al., supra, wherein the Court, holding that quartzite stone which could not be marketed at a profit did not qualify as a valuable mineral locatable under the mining laws, stated:

> Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable". It is a logical complement to the "prudent man test" which the Secretary has been using to interpret the mining laws since 1894....
>
> The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. . . .
>
> We believe that the Secretary of the Interior was also correct in ruling that "in view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety'" and thus falling within the exclusionary language of the 1955 Act, 30 U.S.C. Sec 601, which declares that '[a] deposit of

> common varieties of . . . stone . . . shall not be deemed a valuable deposit within the meaning of themining laws . . . ." The legislative history makes clear that this Act (30 U.S.C. Sec 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947 (30 U.S.C. Sec 601), which provides for the sale of such materials without disposing of the land on which they are found. (Underscoring added.)

It has been found that the material found upon the claims in question possesses in and of itself no property giving it distinct or special values, for it is identical in character to all of the sand and gravel found throughout the Las Vegas Valley. The gravel on these claims is a common variety of material which is no longer open to location under the mining laws.

The only question, then, since these claims were located in 1948, was whether there existed a discovery on each claim prior to 1955. Not only must sand and gravel have been exposed in sufficient quantities and quality to warrant development for the reasonable prospect of success, there must have existed a present market for the material found on these claims.

The small amounts of material taken from the claims by Mr. V. D. Bradley and mixed with materials from an operating gravel plant cannot be considered as production in the sense that it establishes a market. The material, consisting mainly of fines, was taken from the reworked gravels found in the washes and had only limited use for patching purposes. At that time, there was no present demand for the material found upon the claims because the market was being supplied by existing sand and gravel plants. It was not until 1964 that the construction of a road nearby created a demand sufficient for a large sand atd gravel plant to be operated on the Las Vegas Nos. 12 and 13. Prior to that time there was no production of significance from any portion of the claims in issue.

There was no bona fides in development on the claims until 1956 or 1957, when Mr. Bradley was hired to dig a hole on every 10-acre tract of land. Prior to these excavations being made, even the existence of a marketable quantity of gravel was not known and could only be inferred. Further, in the past the quality of the material found on the claims was a serious detriment to mining. The presence, throughout the claims, of a cemented capping made mining economically unfeasible until the recent development of larger, heavier mining equipment.

Final Conclusion

It is concluded that the market, if it now exists, for the material found on the claims in issue came after the passage of the Act of June 23, 1955, supra. The allegations of the complaints have been sustained and the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims are held to be void.

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed with the Office of the Hearing Examiners, Salt Lake City, Utah. Appeals must be in strict compliance with the regulations in 43 CFR, Part 1840, a copy of which, issued as Circular 2137, is attached. A summary of information on filing appeals with the Director (Form 1842-1) is also attached.

* * * *

/s/ John R. Rampton, Jr.
Hearing Examiner

UNITED STATES
v.
WILLIAM A. McCALL, SR.
THE DREDGE CORPORATION
ESTATE OF OLAF H. NELSON, Deceased
SMALL TRACT APPLICANTS ASSOCIATION,
Intervenor

IBLA 70-309 through 70-329
2 IBLA 64 Decided March 22, 1971

Mining Claims: Discovery: Marketability
Mining claims; Common Varieties of
Minerals; Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the aboundant supply of similar material found in the area, is insufficient to snow that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being

sold but it must be shown that the mineral from the particular deposit could have been extracted, sold and marketed at a profit.

Mining Claims: Discovery: Marketability --Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

Mining Claims: Discovery; Marketability

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make such a showing the claim is properly declared null and void.

Rules of Practice: Hearings-- Mining Claims: Hearings

It is proper to allow a third party to intervene in a proceeding where an interest of the intervenor may be affected by the outcome of the proceeding.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

IBLA 70-309 through 70-329 March 22, 1971

UNITED STATES, Contestant, v. WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, ESTATE OF OLAF H. NELSON, deceased, Contestees, SMALL TRACT APPLICANTS ASSOCIATION, Intervenor.	Nevada Contests 3092-3095, 3097-3106, 3108-3113 and 3224 Placer mining claims declared null and void Affirmed

DECISION

William A. McCall, Sr., and the other contestees have appealed to the Director, Bureau of Land Managment, 1/ from a decision dated August 15, 1968, whereby a hearing examiner declared the Las Vegas Nos. 1 through 6, 8 through 17, 19 through 23, 25 and 26 placer mining claims null and void on the ground that the sand and gravel for which the claims were located are common varieties within

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1/ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. Sec. 611 (1964), and there was no discovery of a valuable mineral deposit on any of theclaims because there was no market for the mineral material found on the claims as of the date of the Act. The decision also rejected the application for mineral patent Nevada 012928, and denied the motions by the contestees to dismiss the contest under the act of March 3, 1891, 43 U.S.C. Sec. 1165 (1964), and to deny intervention by the Small Tract Applicants Association.

The Las Vegas group of placer mining claims was located March 20, 1948, by Vernon D. Bradley, John W. Bonner, N. C. Bradley, and G. C. Bradley. Each claim includes 80 acres, and in toto, these contested claims encompass 1,680 acres, described as all section 15, W 1/2, W1/2 SE 1/4 section 22, S 1/2 section 27, S 1/2 NE 1/4, N 1/2 S 1/2 section 28, S 1/2 SE 1/4 section 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The claims are adjacent to the boundary of Las Vegas City, and are approximately 5 miles from the Clark County Courthouse in the center of Las Vegas.

By an instrument dated June 1, 1948, the four original locators released and quit claimed their interests in the Las Vegas group of claims to O. H. Nelson, who subsequently quit claimed an undivided one half interest in these claims to William A. McCall, Sr., in an instrument dated September 24, 1952.

Nelson and McCall filed application Nevada 012928, on March 27, 1953, for patent to the Las Vegas group of placer mining claims. The land office manager at Reno, Nevada, issued a final certificate on these claims on October 8, 1954 2/ The Las Vegas number 23 claim was conveyed to the Dredge Corporation by a quit claim deed dated March 27, 1959.

2/ Mineral patent application Nevada 012928, filed March 27, 1953, included Las Vegas 1 through 23, 25 through 27 placer mining claims in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. The land office manager issued a certificate October 8, 1954. Patent 1211178 was issued August 4, 1960, for 40 acres described as SW 1/4 NE1/4 section 22, T. 20 S., R. 60 E., M.D.M., in Las Vegas 7, supplanting another patent 1211178 inadvertently issued on the same date for 400 acres, being all of the land in Las Vegas 1, 2, 7, 18 and 27. Patent 27-65-0095 was issued Septembsr 25, 1964, for 190 acres described as SE 1/4 SE 1/4, S 1/2 NE 1/4 SE 1/4, NE 1/4 NE 1/4 SE 1/4 section 22 (in Las Vegas 2), S 1/2 S1/2 NW1/4, NE 1/4 SE 1/4 NE 1/4 section 27 (in Las Vegas 18), and SE 1/4 NE1/4 NW 1/4 section 27 (in Las Vegas 27).

The present proceedings arose from complaints, Nevada 3092-3095, 3097-3106, 3108-3113, issued March 18, 1960, by the land office manager against the Las Vegas Nos. 3 through 6, 8 through 17, 19 through 22, 25 and 26 placer mining claims, charging that the land within the limits of each claim is nonmineral in character and that no discovery of valuable mineral has been made within the limits of the claims because the materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials. Complaint Nevada 3224 against the Las Vegas No. 23 claim, issued June 1, 1961, charged that the land embraced within the claim is nonmineral in character and that no discovery of a valuable mineral has been made within the limits of the claim because no actual market for the mineral materials claimed existed before July 23, 1955, and that these minerals are not considered a valuable mineral deposit under section 3 of the Act of July 23, 1955; therefore, any market for such materials developed after that date does not constitute a valid discovery within the mining laws. The Las Vegas No. 23 claim was consolidated into patent application Nevada 012928 by the Secretary's decision, United States v. McCall, A-29161 (July 30, 1962).

The contestees filed timely answers denying the charges. On April 20-23, 1965, a hearing on all the complaints was held at Las Vegas, Nevada, before a hearing examiner who set forth his findings and conclusions in the decision of August 15. 1968, the subject of this appeal.

The appellants contend essentially that the hearing examiner's decision is contrary to the evidence, that the provisions of the act of July 23, 1955, 30 U.S.C. Sec 611 (1964), do not apply to these mining claims which were located in 1948, that it is illegal to apply the rule of "marketability at a profit," that the contests are barred by 30 U. S.C. Sec 38, and that it was illegal to allow intervention by the Small Tract Applicants Association.

The contestant filed a brief in support of the hearing examiner's decision generally, and the intervenor filed a brief in support of the hearing examiner's decision insofar as it permitted the intervention.

As the appellants contend the hearing examiner's decision is contrary to the evidence, and the appellee to the oppsite effect, we shall set forth the salient points adduced at the hearing.

Witnesses appearing for the contestant were George O. Scarfe, Jr., a valuation engineer (mining), employed by the Bureau of Land Management, and Lewis G. Chichester, the assistant land office manager for the Branch of Mining, Nevada land office, each qualified as an expert witness. Scarfe testified that he, by himself, had made several examinations of the Las Vegas group of placer mining claims in June, July and August 1959, and again in the company of Chichester in July 1963 and January 1965. He described the claims,

identified by reference to established and found cadastral survey corners, as lying on an alluvial fan at an elevation of approximately 2500 feet, with a general slope of 2% toward the east. The alluvium is mostly limestone fragments, ranging in size from boulders to silt, and with some aeolian deposits in the top one foot. A caliche capping is present, varying from exposure at the surface to a depth of four feet. There is loose sand and gravel above the caliche throughout the area of the claims, as well as rework gravel in the washes which cross the claims. Scarfe described the caliche as a calcareous cement on the limestone deposits, formed by evaporation of the ground water. The caliche capping can be broken by blasting and, after treatment, the rock can be used as ordinary gravel. The material on these claims is similar to that found extensively in the Las Vegas Valley and is suitable for base course filling in highway construction, bituminous mix, and concrete aggregate. Scarfe submitted a sketch map of section 15, 22, 27 and 28, T. 20 S., R. 60 E., (Ex G-14), showing the location of the Las Vegas claims, depth of surface sand and gravel above the caliche layer, development workings such as shafts, trenches and bulldozer cuts on each claim, and surface improvements such as roads and power lines, as they existed on September 20, 1959. He described the shafts as having been dug by means of blasting and backhoe excavation, and the trenches as having been dug by hand. He stated that there was no evidence whatsoever of any mining on the contested Las Vegas claims before

his examinations in 1959. He submitted another sketch map, Ex. G-15, showing the same area as G-14, depicting the locations of 64 pits which had been dug as additional development workings by July 31, 1963. His examination of the new shafts showed much silt-like lacustrine deposits in the Las Vegas Nos. 3, 4, 5, and 6 claims. The caliche-coated material exposed in the shafts could be mined, but would require more treatment at a greater expense to make it satisfactory for use as aggregate. He described a pit which had been opened on the Las Vegas Nos. 12 and 13 claims, in which considerable mining had been done recently, with the material screened and stock-piled on the claims, although there had been some hauling of finished material during his examination. The screening had developed a large amount of "fines," which do not meet road specifications. The pit operation in the Las Vegas Nos. 12 and 13 claims had been blasted through the caliche, with the excavation about 20 feet deep, where another layer of dense cementation was encountered. The gravel, however, was mineable. Scarfe stated his opinion that most of the material on the contested claims, excepting the lake-bed material and the caliche capping, would make specification gravel. He stated that any operation prior to 1959 would have been compelled to break the caliche by drilling and blasting before excavation would be possible, and these things would have increased greatly the overall cost to obtain usable gravel. The competitors operating in neighboring pits are mining gravels having much less caliche-cement. Overall, though, the material in the Las Vegas claims is very much similar to that found widespread through-

out the Las Vegas Valley area. The material on these contested claims has no special or distinct characteristics or properties which make the deposits unique. Scarfe said that one shaft on each claim was sampled for gold, with negative results from each claim. He stated that he recommended the contest proceedings as it was his opinion, considering both the "prudent-man rule" and the "marketability rule" and the Act of July 23, 1955, supra, that a valid discovery of a valuable mineral deposit had not been made on any of the claims.

Chichester testified that he had accompanied Scarfe in July 1963 to examine the claims, and having heard all the Scarfe testimony, he declared he would have given substantially the same answers in response to the questions asked. He then testified as to the Las Vegas No. 23 claim, which Scarfe had not examined, stating that insufficient exploration work had been done by the climants. This claim, in the S 1/2 SE 1/4 section 29, cornering on the Las Vegas No. 22 claim, is dissected by a major wash some 35 feet deep. Cemented gravels derived from limestone and dolomite are present. He defined "caliche" as "cemented gravels." and gave his opinion that each claim lacks a valid discovery, and added that except for the provisions and limitations of Public Law 167, Act of July 23, 1955, supra, the Las Vegas Nos. 5, 12, and 13 claims might be considered valid locations as they can be operated profitably in the present Las Vegas area market for sand and gravel. All the other claims have too much blow sand and caliche cementation to support

any profitable operations, even if presently subject to mining claim location.

Several witnesses appeared on behalf of the contestees. Vernon D. Bradley, one of the original locators of the Las Vegas group of claims, testified that in 1948 he was the major producer of sand and gravel in the Las Vegas Valley, and he had located the Las Vegas group of claims as future reserves for his plant on the Best Bet placer mining claim in S 1/2 NE 1/4 section 27, T. 20 S., R. 60 E. This claim has since been patented. He stated he had done the necessary discovery work on each claim and had removed perhaps 50 to 100 yards of material from each claim. He sold the Las Vegas claims to Olaf Nelson, and other adjacent claims to William McCall and to Wells Cargo Company. He was unable to state that Nelson had removed material from the contested claims, although much material was taken from the Las Vegas Nos. 1, 2 and 7. He said he was hired in 1956 or 1957 by Nelson and McCall to dig exploratory holes on each 10-acre subdivision of each of the contested Las Vegas claims. The excavated material was run through the plant on the Best Bet claim, and was used on a job at the Las Vegas City Jail. Bradley stated that before washing plants were installed in the area, most gravel excavation was done in the bottom of dry washes where there was no excess of fines. On cross-examination, Bradley stated that he did not know of the removal of any significant amounts of material from the contested claims although Nelson did take lots of material from the Las Vegas Nos. 1, 2,7 and

18. (Patents have since been issued for all or parts of these claims.) He said he had done no exploratory work on the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 claims while he owned them, but in 1957 he had dug small pits on each of these claims at the behest of Nelson. The Las Vegas claims have been used as dumping grounds for excess unusable materials from other sources in the past. He stated the Las Vegas claims were located as a source of good gravel close to the City of Las Vegas, but were not operated because the Best Bet provided all the materials he needed for his operations in 1948, although he did take small amounts of surface gravel in the washes on some of these claims, for use in blending wigh Best Bet gravels.

Stanley Hansen, vice president and general manager of Wells Stewart Constructon Company, highway contractors, testified that his company had been operaging on the Las Vegas Nos. 12 and 13 claims since 1963, but had done no work on the claims prior to 1963. He stated that some 400,000 tons of material had been extracted from these claims in 1964. He said that material on these claims could be processed into Type 1 and Type 2 material for roads, and for plant mix surface, but from 3 to 7 percent was wasted as fines in screening for Type 2 material. He testified that hauling costs are a very important factor in supplying aggregate for road construction, and that his company tries to keep the hauling distance under three miles.

Joe W. Wells, president of Wells Cargo Company, a constructon firm, testified that he had obtained title to the Best Bet claim in 1949 for a source of sand and gravel for local use, and that he had an agreement dated March 24, 1959, with Nelson and McCall to obtain a 20% interest in the Las Vegas group of claims after doing the exploration work on each 10-acre subdivision of each claim. The exploration work cost approximately $25,000. He said that the material on the Las Vegas claims would be processed into sand and gravel meeting all specifications for both highway and building construction. He said he was aware of operations on the Las Vegas claims since 1948, but he had no specific knowledge as to work on any individual claim in this group. He stated that the cemented gravels on the claims could be broken by shooting and then processed to meet any standard specifications. Such processing is more expensive and therefore little production of such gravel occurred in the period prior to 1959, but now a big ripper mounted on a heavy "cat" can break the cemented gravels. Water soaking is efficacious to dissolve the "cement", and smaller,"cats" can be used for ripping after such soaking. He stated it is cheaper to drill a water well and soak the cemented material in place than it is to shoot or dry rip. The economics of the situation precluded much blasting to break the cemented gravels prior to 1957. He predicted a much greater need for sand and gravel in the Las Vegas area in upcoming years, so that the Las Vegas claims are ideally suited to supply future construction needs in the area.

Howard Geer, an employee of J. M. Murphy Construction Company, testified that Murphy had operated a plant from 1948 to 1952, producing Type 2 base material on the Las Vegas No. 18 claim, but he could not state that material was extracted from any other of the Las Vegas claims for that operation. He said that all of the contested Las Vegas claims have sand and gravel.

Eton Stout, a contractor, testified that he is operating a hot mix plant on the patented Homesite ccaim, N /2 NE 1/4 sect'on 27, with his pit some 35 feet deep. He is of the opinion that the pit could be deepened another 75 feet through good gravel, but such a depth would damage the property for other uses, leaving only a large hole. Also, he stated the costs of mining would be increased by the lifting haul from the bottom of such a deep pit. He said he had tested materials on the Las Vegas Nos. 19, 20, 25 and 26, finding a little hardpan on top, but very good gravel below. He stated the hardpan had been successfully broken by a D-9 cat with a ripper. In his opinion, the Las Vegas Nos. 3, 4, 5, 6, 11, 12, 13 and 14 in section 15 would be easier to mine as there is less hardpan in that area, and the gravel material is similar to that found throughout the whole area of the claims. He stated there is no caliche on any of these claims, as caliche is never gravel. The cemented gravels are not caliche. They can be broken by ripping, with or without water soaking, and then run through a crusher and screened into the type material desired.

Elvin Hitchcock, formerly employed by Vernon Bradley, testified that he had heard all of Bradley's testimony and, that if asked the same questons on examination or cross-examination, he would give substantially the same answers.

William C. Harman, vice president of Wells Cargo, stated that he superintended the drilling of the pits on each 10-acre subdivision of the Las Vegas claims, excepting Las Vegas No. 23, after Wells Cargo had bought a 20% interest in the claims in 1959. The pits were drilled to a depth of 10 feet and shot, then cleared by a backhoe. The resulting pits were from 7 to 10 feet wide, 20 to 25 feet long, and at least 12 feet deep. Sand and gravel were found in every hole, but with variations according to the location of the pit on the alluvial fan; that is, some pits had coarser deposits, some finer, but all were substantially sand and gravel from top to bottom. The gravels from these claims are still able to meet the more stringent specifications now imposed. In his opinion, Hartman stated the cemented gravels, after crushing, are equally as good as theloose gravels for either road or other construction. At the present time, horticulture provides a market for the excess fines recovered from screening oerations. Hartman defined caliche as a tightly cemented calcareous fine material, very dense and with no rocks. Cemented gravel is variable in composition. The highly cemented gravel is actually a variable conglomerate and resembles ordinary concrete when broken.

There are no true caliches in the Las vegas claims, only cemented gravels.

Howard Green, one of the intervenors, testified relative to small tract applicatons which had been filed for some of the lands embraced in the Las Vegas claims, but submitted nothing bearing on the question of the validity of the mining claims.

The basic principles of law applicable to this case are now well established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

> (W)here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. the present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, prox-

imity to market, and the existence of a present demand. The marketability test has been specifically found to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F 2d 791 (9th Cir. 1968), cert denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F 3d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414, D. Nev. Aug. 1964).

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955, 30 U.S.C. Sec 611 (1964), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the material could have been extracted, removed and marketed at a profit, had been met by that date. Palmer v. Dredge Corporation, supra; United States v. Barrows, 404 F 2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969).

There is no contention that any of the claims has an uncommon variety of sand or gravel, and, indeed, the evidence shows clearly that the mineral material present is of an ordinary nature and common variety, similar to that found widespread throughout Las Vegas Valley. We turn, therefore, to a consideration of the evidence bearing on the marketability as of July 25, 1955, of the sand and gravel from these contested claims.

The Government's expert witness, Scarfe, testified that he found no evidence of any mining activity when he examined the claims in 1959, and that the caliche-coated material probably could not have been mined, crushed, and processed into material usable for fill except at a much greater cost than would be required ta extract and process the unconsolidated sands and gravels on other mining claims in the near vicinity.

Testimony was given that larger equipment now available can break the cemented gravels, so that they are suitable for common usages of sand and gravel, and that water soaking can be employed and the gravels mined with smaller equipment.

The original locator of the Las Vegas ccaims, a leading puvveyor of sand and gravel in the Las Vegas market in 1949, testified that he had satisfied the demand for sand and gravel from other claims adjacent to these contested Las Vegas claims and from sources elsewhere in Las Vegas Valley, and that he had located these Las Vegas claims as a reserve for future operations, but had taken some small amounts of surface material from the washes that cross these claims.

Testimony was given to the effect that the demand for sand and gravel in the Las Vegas area was increasing so there was a growing need for the materials on these claims. But it was adduced that road contractors, who need large amounts of material, try to find sourdes of gravel for fill within three miles of the construct'on area, as hauling

costs make up a large part of the cost of sand and gravel, and hauling beyond three miles limits the marketability of sand and gravel for road construction purposes.

Much of the testimony relating to operations and production of sand and gravel prior to July 23, 1955, related to the Las Vegas Nos. 1, 2,7, 18 and 27 claims, rather than to the Las Vegas claims included in these contests.

The best that can be said for the testimony on behalf of the contestees is that there was a general demand for sand and gravel in the Las Vegas area of the type present on these claims, but nothing was adduced to indicate that the cemented gravels prevalent on these claims could have been mined, processed and marketed at a profit before July 23, 1955. The testimony was insufficient to show a discovery because to satisfy the present marketability test the claimants must show the existence of a demand for the material on the specific claims and not simply a general demand for the type of material in question. United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); United States v. Everett Foster, 65 I.D. 1 (1958); aff'd in Foster v. Seaton, 271 F2d 836 (D. C. Cir. 1959); United States v. Loyd Ramstad and Edith Ramstad, A-30351 (September 24, 1965); United States v. J. R. Osborne, 77 I.D. (1970); United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970); United States v. Neil Stewart, 1 IBLA 161 (1970).

The claimants contend the successful mining operations on similar mineral materials in the adjacent Las Vegas Nos. 1, 2, 7, 18 and 27 claims and in other claims nearby, before July 23, 1955, is adequate proof that these claims could also have been operated at a profit in that period. This is the same type of theoretical evidence which the court in Osborne v. Hammit, supra, found to be insufficient to satisfy the marketability test as to similar placer mining claims in the Las Vegas area. A further discussion of Osborne v. Hammit is given in United States v. Osborne, supra, United State v. Ramstad, supra, United States v. Keith J. Humphries, A-30239 (April 16, 1965).

Obviously the claimants have failed to show that by reason of present demand, bona fides in development, proximity to market and accessibility, and other factors, the deposits on these Las Vegas claims were of such value that they could have been mined, removed and disposed of at a profit as of July 23, 1955.

The contention that it was improper to admit the intervenors into these proceedings is without merit. Although the present rules of practice of this Department do not specify the procedure for intervention, we deem it proper to allow third party intervention where an interest of the intervenor may be affected by the outcome of the proceeding. See Fed. R. Civ. P. 24. The hearing examiner was not in error to permit intervention by the Small Tract Applicants Association in these proceedings.

The contention that the Las Vegas claims are valid under Rev. Stat. Sec. 2332, 30 U.S.C. Sec. 38 (1964) has no merit. This section provides:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

The contestees assert that they have satisfied all the requirements of the statute. Under consistent rulings of the Department and of the courts, a valid discovery of a valuable mineral deposit is essential to establish the validity of a mining claim, even in view of section 2332, Revised Statutes, 30 U.S.C. Sec. 38, Cole v. Ralph, 252 U.S. 286, 307 (1919); United States v. Alice A. and Carrie H. Boyle, 76 I.D. 318 (1969). Under circumstances as in these proceedings where the evidence falls far short of that required to establish a valid discovery as of July 23, 1955, the claims were properly declared null and void.

Similarly, the appellants' contention that they are entitled to a patent pursuant to the provisions of section 7 of the Act of March 3, 1891, as amended, 43 U.S.C. Sec. 1165 (1964) is without merit for that section does not apply to the mining laws. Palmer v. Dredge Corporation, supra.

The contention that the hearing examiner submitted a draft decision to the Department for appvoval prior to promulgation is not supported by the record. Whatever may have been intended in the hearing examiner's letter of January 12, 1967, to Howard Greene, with copies to the attorneys for the contestant and for the contestees, the decision of August 15, 1968, is the independent conclusion of the hearing examiner made without prior review by the Department.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Intevior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

/s/ Martin Ritvo, Member

We concur:

/s/ Francis Mayhue, Member

/s/ Edward W. Stuebing, Member

No. 80-1181

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. MCCALL, SR., ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1181

WILLIAM A. MCCALL, SR., ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' patent applications for certain sand and gravel mining claims because petitioners failed to make discoveries of valuable mineral deposits on those claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is not reported. The findings of fact and conclusions of law of the district court (Pet. App. A-6 to A-19) are unreported. The opinion of the Interior Board of Land Appeals (Pet. App. A-53 to A-74) is reported at 2 I.B.L.A. 64.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1980. The order of the court of appeals denying rehearing and rehearing en banc was entered on October 17, 1980 (Pet. App. A-30 to A-31). The petition for a writ of certiorari was filed on January 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended by Section 1 of the Act of Sept. 28, 1962, Pub. L. No. 87-713, 76 Stat. 652, 30 U.S.C. 611, provides:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * * .

STATEMENT

This suit concerns 21 sand and gravel placer mining claims encompassing 1,680 acres situated within five miles of the center of Las Vegas, Nevada. The claims at issue are placer claims Las Vegas Nos. 3-6, 8-17, 19-23, 25 and 26.[1]

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[1]The claims at issue here are located in the immediate proximity of petitioners' Las Vegas claims Nos. 1, 2, 7, 18 and 27, which are the subject of a separate petition in No. 80-1180. Other claims, or portions of claims, within the general Las Vegas group were patented and are not a subject of litigation. See map following page 7 of the petition.

These claims were among 27 located in 1948 by petitioners' predecessors in interest. Subsequently, when petitioners applied for patents on various of the 27 claims,[2] the Secretary of the Interior initiated administrative contest proceedings against the claims at issue, alleging, *inter alia*, that no discovery within the meaning of the general mining laws, 30 U.S.C. 22 *et seq.*, had been made because the material could not be marketed at a profit and no actual market had been shown. Pet. App. A-32 to A-33.

A four-day hearing was conducted before an administrative law judge (ALJ) at which the petitioners and the government presented testimony and other evidence concerning the claims. Following the hearing, the ALJ found the claims to be invalid for lack of discovery. Relying upon this Court's decision in *United States* v. *Coleman*, 390 U.S. 599 (1968), the ALJ ruled that a claimant seeking a mining patent based on the alleged discovery of minerals withdrawn from further location by Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, is required to show that the minerals could have been profitably extracted and marketed on the date of enactment of the statute. The ALJ ruled further that petitioners had failed to meet this requirement, noting that significant amounts of sand and gravel had not been removed and sold prior to the controlling date and that the presence of a cemented capping throughout the claims had made mining on them economically infeasible in 1955 and until the recent development of more efficient equipment. Accordingly, the ALJ held the claims to be invalid. Pet. App. A-40 to A-52.

The petitioners appealed to the Interior Board of Land Appeals (IBLA), which affirmed. 2 I.B.L.A. 64 (1971);

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[2]Patents were sought on all of the claims here at issue except for Las Vegas No. 23. See note 1, *supra*.

Pet. App. A-53 to A-74. The IBLA, after reviewing the administrative record in detail, ruled that "the evidence falls far short of that required to establish a valid discovery as of July 23, 1955 [and thus] the claims were properly declared null and void." Pet. App. A-73.

Three years later, in 1974, petitioners filed a complaint in the district court seeking judicial review of the IBLA decision. The complaint alleged, *inter alia*, that the Secretary had acted arbitrarily and capriciously by invalidating the claims and that he had applied an erroneous standard of marketability. The district court held that the Secretary had applied the proper judicially approved standards and that his decision was supported by substantial evidence (Pet. App. A-6 to A-19). Petitioners' motion for reconsideration was denied (Pet. App. A-19 to A-28). The court of appeals affirmed (Pet. App. A-1 to A-6).

ARGUMENT

This case presents no issue warranting review by this Court. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The general mining laws permit a private individual, subject to certain restrictions, to claim for himself such valuable minerals as he may find on the public lands. The mining laws also permit him to obtain a patent for the lands on which such minerals are discovered. See Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. 22 *et seq.* However, as the sole purpose of the mining laws is to encourage actual mineral development, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), a mining claim, to be valid, must strictly comply with the requirements of the mining laws.

One of the principal requirements of the mining laws is that the claimant must make a "discovery" of a "valuable mineral deposit" within the limits of each claim. *Cole* v.

Ralph, 252 U.S. 286, 295-296 (1920). The classic statement of the test for establishing a discovery of a valuable mineral deposit was made by the Secretary in *Castle* v. *Womble*, 19 Pub. Lands Dec. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This "prudent person" test has been endorsed by this Court on numerous occasions. See, *e.g.*, *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963); *Cameron* v. *United States*, 252 U.S. 450, 459 (1920). In *United States* v. *Coleman*, *supra*, 390 U.S. at 602, the Court recognized that "profitability is an important consideration in applying the prudent-man test * * * ." Under this marketability criterion, it must be shown that the minerals on the claim can be extracted, removed and marketed at a profit. *Coleman*, *supra*, 390 U.S. at 600; *Melluzzo* v. *Morton*, 534 F. 2d 860, 862 (9th Cir. 1976).

Enactment of Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, withdrew common varieties of sand, gravel, and other similar minerals from further location under the mining laws. *Coleman*, *supra*, 390 U.S. at 603-605. Consequently, claimants, such as petitioners here, who had located common varieties of sand and gravel prior to the effective date of the Act, must establish a discovery by showing that the minerals could have been extracted and marketed at a profit as of July 23, 1955.[3]

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[3]Contrary to petitioners' suggestion the Interior Board Land Appeals did not overrule its decision in this case in *United States* v. *Gibbs*, 13

Cameron v. *United States*, *supra*, 252 U.S. at 456; *Melluzzo* v. *Morton*, *supra*, 534 F. 2d at 862; *Hallenbeck* v. *Kleppe*, 590 F. 2d 852, 856 (10th Cir. 1979).

2. The courts below and the Secretary correctly applied these rules of discovery to the claims at issue. Contrary to petitioners' assertion (Pet. 29-34), the Secretary did not require the claimants to demonstrate that they had actually extracted and sold sand and gravel from each claim. Rather, as the court of appeals correctly observed (Pet. App. A-3 to A-4), the Secretary based its ruling on the absence of evidence to indicate that the materials on the claims could have been mined, processed and marketed at a profit before July 23, 1955, and not on the absence of exploitation itself.[4] A lack of significant actual sales of materials from a claim will, however, support an inference that the materials cannot be profitably marketed. *Cameron* v. *United States*, *supra*, 252 U.S. at 457; *Melluzzo* v. *Morton*, *supra*, 534 F. 2d at 863. Here, petitioners failed to introduce evidence sufficient to overcome the inference.

Similarly, although the ALJ noted that the amount of sand and gravel on the claims greatly exceeded the quantities reasonably needed for a reserve supply (Pet. App. A-44),

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I.B.L.A. 382 (1973). In *Gibbs* (13 I.B.L.A. at 393 n.7), the Board merely criticized language in its *McCall* decision which was subject to misinterpretation. The Board reaffirmed its adherence to the marketability test (ibid.), which was the basis for its *McCall* decision (see Pet. App. A-72).

[4]Petitioners' contention (Pet. 9) that the contest complaint failed to advise them of the significance of the July 23, 1955 date was not raised at the administrative level or in the courts below and may not be considered here for the first time. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). In any event, petitioners' counsel at the administrative hearing understood the government's position to be that petitioners had to show a discovery as of July 23, 1955 (Tr. 415-416), and petitioners have not shown that they were in any way prejudiced by the alleged deficiency in the contest complaint.

the Secretary did not reject the patent applications on the ground that petitioners had located "too much." See *Baker* v. *United States*, 613 F. 2d 224 (9th Cir. 1980), cert. denied, No. 79-1964 (Oct. 20, 1980). Rather, as noted by the court of appeals (Pet. App. A-5 to A-6), the Secretary's finding of lack of marketability was based on the fact that, unlike other claims in the area for which patents were issued, the subject claims were covered at or near the surface by a cemented layer, known as caliche, which increased extraction costs. Thus, the subject claims could not economically compete with other nearby claims containing large quantities of unconsolidated sand and gravel. Pet. App. A-51, A-61.

3. There was substantial evidence in the administrative record to support the Secretary's finding that the sand and gravel from the subject claims could not have been profitably extracted and marketed as of July 23, 1955. At the contest hearing, a government witness who had examined the claims testified that a cemented layer of caliche covered virtually all of the ground encompassed by the claims and that the caliche capping occurred at, or just below, the surface. Pet. App. A-59 to A-60. He further testified that the caliche capping would increase the costs of extraction, and that the subject claims consequently could not compete economically with other nearby claims where the caliche layer was thinner or non-existent. Pet. App. A-61. His testimony was corroborated by the testimony of one of petitioners' own witnesses who stated that sand and gravel producers in the Las Vegas area generally avoided areas capped with caliche until after 1959, when larger equipment which could rip through the capping without drilling and blasting became available. Pet. App. A-65. Since there was substantial evidence in the administrative record to support the

Secretary's decision, that determination was properly upheld by the courts below. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

DOJ-1981-02

NO. 80-1181

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., THE DREDGE CORPORATION, a Nevada corporation, and THE ESTATE OF OLAF H. NELSON,

Petitioners,

vs.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

SMALL TRACT APPLICANTS ASSOCIATION,

Intervenor.

INTERVENOR'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE NO. CA 77-3429

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STATEMENT OF THE CASE

This case involves twenty-one (21) placer mining claims located March 20, 1948, by predecessors in interest of Petitioners (R.79). The claims are five (5) miles from the center of the City of Las Vegas, Nevada (A.32).

The lands in all the contested claims except Las Vegas No. 23 were classified for disposal under the Small Tract Act (43 U.S.C. 682) by Classification Order No. 95 dated October 2, 1953. The lands embraced in Las Vegas No. 23 claim were classified for disposal under the Small Tract Act by Order No. 130 dated September 20, 1957 (A.32 & 33).

The present proceedings began in 1960 when the Bureau of Land Management filed Complaints alleging that no discovery had been made on the claims because the material could not be marketed at a profit and no actual market for the material had been shown (R.81). As to Las Vegas No. 23, a Contest Complaint was filed June 21, 1961, on the same basis as

those of the other claims (R.81). A four-day hearing was held April 20-23, 1965, on the Complaints at Las Vegas, Clark County, Nevada, before Hearing Examiner John R. Rampton, Jr. The evidence presented in the administrative hearings is as follows:

George O. Scarfe, Jr., a Valuation Engineer with the Bureau of Land Management in Sacramento, California, testified that he examined the claims June 8, 1959, July, 1963, and January, 1965 (Tr.140). The claims are located on an alluvial fan consisting of limestone fragments of sizes from boulders down to fine sands and silts (Tr.144). About six (6) types of materials were found on the claims: (1) blow-sand, (2) wind born sand covering most of the surface to a depth of about a foot, (3) loose gravel, (4) caliche capping found over practically all the claims at depths varying from 0 feet from the surface down to 3-1/2 to 4 feet, (5) cemented gravels and lake deposits, and (6) in major washes some rework gravel which

was loose (Tr.144).

Specifically as to caliche, Mr. Scarfe testified that it is a calcareous cement which presents problems in working sand and gravel claims. It complicates mining because it cements the gravels in place. At spots in these claims, the caliche actually forms a cap. Caliche looks like concrete and it can be broken only by blasting. Caliche coating on gravel often makes the gravel less desirable and requires more treatment to make it an acceptable quality to market (Tr.147-148).

Mr. Scarfe further testified that a hard caliche capping is found everywhere on the claim at varying depths; on some claims it was within a foot of the surface. On Claim No. 8, it was right at the surface. It looks like concrete. It varies from one to three feet in thickness (Tr.180).

As to the development of the claims, Mr. Scarfe testified that there was no mining whatever on the claims up to 1959, only trenching

and bulldozing work (Tr.180). There was no evidence of any removal of any materials from the claims in 1959 (Tr.183).

In order to make aggregate from the claims, Mr. Scarfe testified that it would be necessary to drill and blast the caliche capping and cemented gravels. Of course, this work would add to the cost of production. In fact it was much more costly than mining loose gravels (Tr.187).

On Claims 3, 4, 5 and 6, Mr. Scarfe in 1963 noticed considerable lake bed deposits mixed with the gravels which would be deleterious to production (Tr.189). The cemented material underlying nearly all the claims would have to be drilled and blasted before it could be mined and this increases the cost (Tr.196-7).

The sand and gravel material on these claims is similar to that on other claims in the general area (Tr.203-4). Mr. Scarfe also testified that he sampled all the claims for placer gold. The results proved negative showing no gold (Tr.209-10).

Finally, the fact that there was no production on the claim in conjunction with the competition for sand and gravel in the Las Vegas Valley greatly influenced Mr. Scarfe's decision that there was no valid claim (Tr.224).

Louis G. Chichester, Bureau of Land Management Assistant Land Office Manager, Reno, Nevada, Land Office, testified that he examined the claims in July, 1963, October 21, 1964, and January, 1965. His answers would be substantially the same as those given by Scarfe. He checked Claim No. 23 without Scarfe (Tr.235). Mr. Chichester testified that Claim No. 23's surface is composed of highly cemented gravels except in washes (Tr.237). There is no exploration work there nor mining improvements (Tr. 239). It would not be practical to mine No. 23 in Mr. Chichester's mind (Tr.239).

Mr. Chichester checked for gold on Claim 23 and found none (Tr.244).

Mr. Chichester concluded that the claims could not have been mined profitably prior to

July 23, 1965 (Tr.261).

On behalf of Petitioners, Vernon O. Bradley testified that he could not say exactly what he mined from these claims, although he is the one who located them in 1948 (Tr.280).

Mr. Bradley knew of no holes of any considerable extent on the claims until 1957 (Tr.307). There was no substantial amount of materials taken from the claims from 1948 to 1957 (Tr.305).

Also on behalf of the Petitioners, Stanley Hanson, General Manager for Wells Stewart Construction Company testified that the claims were located for reserves (Tr.276).

Joe W. Wells, President of Wells Cargo, testified on behalf of Petitioners that in four or five years prior to the hearing, they obtained a piece of equipment known as the "Ripper." Before that it was necessary to blast to get cemented gravels (Tr.352). This testimony was substantiated by William C. Hartman, a Vice-President of Wells Cargo. He said

that before they obtained the Ripper it was necessary to blast and drill (Tr.391).

The Hearing Examiner, Mr. Rampton, rendered his decision August 15, 1968, finding that Petitioner's placer mining claims were invalid and that any market, if one did exist for the material found on the claims, came only after June 23, 1955 (A.52).

Petitioners appealed the decision of the Hearing Examiner and on March 22, 1971, the decision of the Hearing Examiner was affirmed by the Interior Board of Land Appeals (A.53).

Subsequently, Petitioners sought judicial review before the United States District Court for the District of Nevada. The District Court proceeding was handled by way of Stipulation and Order dated August 29, 1975, which provided that the parties would file cross-motions for Summary Judgment (See A.23). The United States District Court decided against Petitioners and an appeal was taken to the United States Court of Appeals for the Ninth Circuit. In a deci-

sion filed July 10, 1980, the Circuit Court of Appeals affirmed the decision of the District Court.

REASONS FOR DENYING PETITIONERS' PETITION

Analyzing each of Petitioners' arguments as to why a Writ of Certiorari should be granted, it is clear that Petitioners must fail in their Petition.

First, it is important to emphasize that Supreme Court Rule 17 provides that a review on Writ of Certiorari is not a matter of right, but of judicial discretion which will be granted only when there are "special and important reasons therefor." Rule 17 lists the type of matters which will be entertained on a Writ of Certiorari -- for example, when a Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, or has decided a federal question in a way which is in conflict with the State Court of last resort, or has so

far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Petitioners contend that their petition should be granted since a clash is brewing between the "mushrooming federal bureaucracy and a tax-paying electorate that resents its high cost." Petitioners point out that President Reagan supports a movement in the Western States which expresses resentment against bureaucratic control of Western Lands, said movement being known as the "Sagebrush Rebellion."

It would appear that granting Petitioners' Petition will not reduce the taxpayers' high cost. It will, in fact, increase taxpayers' costs by requiring further Court involvement. Likewise, it is difficult to see the connection between the "Sagebrush Rebellion" and the granting of Petitioners' Petition. It would appear that the "Sagebrush Rebellion" is a political matter which should not be of concern to the Supreme Court, any way. This

conclusion is supported by the burdensome caseload which the Supreme Court must already bear.

Petitioners' next argument is that the decision below will "affect adversely the mining of all minerals including strategic mining in short supply" so that "our national economy and defense will be in jeopardy." This argument is totally without support. It is clear that this case involves the unique area of common varieties of sand and gravel; and, Petitioners' fears seem to be totally without justification.

Third, Petitioners argue that a conflict of opinion exists between the Ninth Circuit and the Tenth Circuits as to whether cases such as the instant case can be disposed by way of Summary Judgment. Since, in the instant case, Petitioners themselves stipulated before the District Court for the District of Nevada, that the case should be resolved by way of Summary Judgment, there would appear to be no reason for the Court to exercise its discretion to

grant Petitioners' Petition. The Stipulation and Order providing for cross motions for Summary Judgment were dated August 29, 1975 (See A.23).

Petitioners' fourth argument, to-wit: that there was no substantial evidence upon which to base the lower Court's decision simply is not supported by the record. As seen in the Statement of the Case in this Opposition Brief, there was a great deal of evidence supporting the lower decisions, and Petitioners' present Petition does not appear a valid method to obtain another re-hashing of the evidence. The Supreme Court is not intended to be a trier of fact, and in fact, it is not suited for such purposes. After having lost before the Hearing Examiner, John R. Rampton, Jr., the Board of Land Appeals, the United States District Court for the District of Nevada, and the Ninth Circuit Court of Appeals, it appears a little far-fetched anyway to say now that there was not substantial evidence to support the lower

decisions.

Petitioners' argument that the Court below departed from the usual and accepted standard for considering the evidence in the record as a whole is likewise groundless. If in fact Petitioners wanted additional fact-finding, they should not have stipulated to have the matter heard on cross-motion for Summary Judgment. However, since Petitioners did so stipulate, it is hard to see how they can now claim they are entitled to the granting of their Petition.

Again, Petitioners' argument that the Ninth Circuit Court applied the wrong legal principle in reaching its decision simply does not provide a basis for granting a Writ of Certiorari. First, it is clear from reading the record that the Ninth Circuit Court applied the correct legal principles, as did the United States District Court for the District of Nevada. In order for a mineral claim on public lands to be valid, it is necessary that the

discovered mineral deposits be 'valuable' (30 U.S.C. 22 (1964). By act of July 23, 1955, 69 Stat. 368, 30 U.S.C. 611, Congress determined that 'common varieties' of sand and gravel cound not thereafter qualify as 'valuable mineral deposits' within the meaning of the mining laws of the United States.

Consequently, if (Plaintiffs) did not discover valuable sand and gravel deposits on the claim sites prior to July 23, 1955, they do not have a valid claim". Barrows v. Hickel, 447 F2d 80, 82 (9th Cir. 1971).

In determining whether Petitioners had fully complied with the statutory requirements of the "discovery" of sand and gravel deposits prior to July 23, 1955, the Secretary utitlized the Prudent Man test. This test is characterized in United States v. Coleman, 390 U.S. 599, 602 (1968), as follows:

> "... in order to qualify as 'valuable mineral deposits,' the discov-

> ered deposits must be of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine ...
>
> Castle v. Womble, 19 ID, 455, 457 (1894).

This test has been refined by the requirement that " ... it must be shown that the mineral can be extracted, removed and marketed at a profit." United States v. Gibbs, 13 IBLA 382, 600 (1971). This requirement is the marketability test.

The marketability test has been specifically applied to sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F2d 791 (9th Cir. 1968), cert den., 393 U.S. 1066 (1969); Foster v. Seaton, 271 F2d 836 (D.C. Cir. 1959).

The possibility of such marketing is insufficient to satisfy the marketability test for sand and gravel claims in the Las Vegas area. In Foster v. Season, supra, at p. 838,

the Court noted:

> "The Government's expert witness testified that the Las Vegas Valley is almost entirely sand and gravel of similar grade and quality. To allow such land to be removed from public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development."

None of the decisions below in this case were based solely on the fact that Petitioners failed to show a demand for sand and gravel on each of their specific claims. Rather, the decisions were based on the Prudent Man - Marketability Test and after careful review of all the evidence produced during the four-day administrative hearing held before John R. Rampton, Jr.

Specifically, the Board of Land Appeals held as follows:

> "Obviously, the claimants have failed to show that by reason of present demand, bona fides in development, proximity to market and accessibility, and other factors, the deposits on these Las Vegas claims were of

such value that they could have been mined, removed and disposed of at a profit as of July 23, 1955." (A.72)

Further, the Board held:

"The contestees assert that they have satisfied all the requirements of the statute. Under consistent rulings of the Department and of the courts, a valid discovery of a valuable mineral deposit is essential to establish the validity of a mining claim, even in view of section 2332, Revised Statutes, 30 U.S.C. Sec. 38, Cole v. Ralph, 252 U.S. 286, 307 (1919); United States v. Alice A. and Carrie H. Boyle, 76 I.D. 318 (1969). Under circumstances as in these proceedings where the evidence falls far short of that required to establish a valid discovery as of July 23, 1955, the claims were properly declared null and void." (A.73)

Neither does a reading of the Board of Land Appeals decision support Petitioners' contention that the decision of the Board of Land Appeals was a policy decision exceeding statutory and discretionary powers resulting in legislative enactment by executive tribunals which lack such authority. Likewise,

Petitioners are incorrect when they say that the decision of the Board of Land Appeals was based solely on the basis of the "too much" rule. The question of reserves was one of the factors considered, but it was certainly not the sole consideration (A.31).

CONCLUSION

For the foregoing reasons, Petitioners' Petition for a Writ of Certiorari should be denied. It has been over twenty (20) years since the original Hearing Examiner's decision herein, and it appears that it is proper at this time to finally bring this matter to a conclusion.

DATED: February 13, 1981.

Respectfully submitted,

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STATE OF NEVADA)
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AFFIDAVIT OF MAILING

LYNNETTE B. JENSEN, being first duly sworn on oath, deposes and says: That Affiant is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 17 day of February, 1981, Affiant deposited in the United States Post Office at Las Vegas, Nevada, three (3) copies of the within INTERVENOR'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN CASE NO. CA 77-3429, enclosed in sealed envelopes upon which first class postage was fully prepaid, addressed to the following, being all the parties required to be served:

Mr. William Braly Murray, Attorney for Petitioners, 505 Title & Trust Building, 321 S.W. Fourth Avenue, Portland, Oregon, 97204;

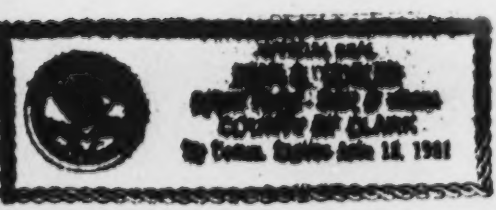
Solicitor General, Department of Justice, Washington, D.C., 20530;

United States Attorney General, Room 5119, Department of Justice, Tenth & Constitution NW, Washington, D.C., 20530.

Lynnette B. Jensen
LYNNETTE B. JENSEN

SUBSCRIBED & SWORN to before me this 17 day of February, 1981.

NOTARY PUBLIC, Clark County, Nevada.



see 80

1180